In the Supreme Court of the United States

No. [redacted]121

GEORGE G. LAMOTTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

T. J. LEAHY,
C. S. MACDONALD,
Counsel for Appellants.

HARLOW PUBLISHING COMPANY Oklahoma City

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No. 400

GEORGE G. LaMOTTE, *et al.*,
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vs.

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Appellee.

STATEMENT.

This is an action brought by the United States in the United States District Court for the Western District of Oklahoma against George G. LaMotte and Anna Marx LaMotte enjoining them from entering into any lease of any kind or character with any noncompetent Osage Indian, or by any means or manner other than that prescribed by that of the Secretary of the Interior, and from occupying and exercising any control, and from assigning and sub-leasing any lands formerly leased or acquired from any non-competent Osage Indian, member of the Osage Tribe of Indians in Oklahoma, without first having

complied with the rules and regulations of the Secretary of the Interior. The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court and the appellants in said Circuit Court appeal to this Court. LaMotte and LaMotte are referred to as appellants, and the United States as appellee herein.

Authority is claimed for this proceeding under the Act of Congress of June 28, 1906, commonly known as the Osage Allotment Act, and the acts supplementary to and amendatory thereof, it being contended by the appellee that said acts imposed upon it the duty of supervising and controlling the leasing of lands for grazing and agricultural purposes belonging to noncompetent Osage Indians, who are members of the Osage Tribe of Indians in Oklahoma. The appellee contends that under said acts of Congress the Secretary has authority to promulgate rules and regulations governing the leasing for agricultural and grazing purposes the lands belonging to noncompetent members of the Osage Tribe of Indians, and that such regulations, when promulgated, have the force and effect of law; that to attempt to make leases with noncompetent members of the Osage Tribe of Indians in any other way than in accordance with the rules and regulations of the Secretary of the Interior, and upon the form prescribed by him, is a violation of law, and that parties attempting so to do should be enjoined from so doing.

It is claimed by the appellee, under said acts of Congress, that the Secretary of the Interior has control not only of the matter of approval of leases made and entered into, but of the manner and method of making and entering into such leases between noncompetent members of the Osage Tribe and other people; that is,

that authority is granted not only to approve the leases, but also to promulgate rules and regulations under which such leases shall be made; that a parent of minor members of the Osage Tribe of Indians may not make an agricultural or grazing lease on lands belonging to his minor children, as members of the Osage Tribe, without the approval of the Secretary of the Interior, and under the rules and regulations of the Secretary of the Interior; and that this is true whether the parent of the child be a member of the Osage Tribe of Indians or not, and whether the parent, if a member of the Osage Tribe of Indians, has been granted a certificate of competency or not.

It is further contended by the appellee that this authority claimed also extends to lands inherited by a noncompetent member of the Osage Tribe of Indians from another noncompetent member of the Osage Tribe of Indians, and to lands obtained by will from a noncompetent member of the tribe by another noncompetent member, especially so where there is a clause in the will providing that the beneficiary of the will may not dispose of the lands devised except upon the approval of the Secretary of the Interior. The act of Congress upon which the claim for this authority is based is Section 7 of the act of Congress approved June 28, 1906, 34 Stat. L. 545, as follows:

Sec. 7. "That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members or their heirs shall have the right to use and to lease said land for farming, grazing or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; provided, that parents of minor members of the

tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; and provided further, that all leases given on said lands for the benefit of individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

The specific character of leases involved in this controversy, and which the appellee claims to be unlawful, are:

First: Leases made by the white parent of minor members of the Osage Tribe of Indians on lands belonging to said minor members, without the approval of the Secretary of the Interior and without conforming to the rules and regulations.

Second: Leases made by guardians of the estates of minor members of the Osage Tribe of Indians, acting under authority of the County Court of Osage County, Oklahoma, without the approval of the Secretary of the Interior, and not in accordance with the rules and regulations.

Third: Leases made by Osage Indian parents who have certificates of competency, on the lands of their minor children, without the approval of the Secretary of the Interior, and not in conformity with the rules and regulations.

Fourth: Leases made by Osage Indian parents who have not received certificates of competency, upon lands belonging to their minor children, without the approval of the Secretary of the Interior, and not in conformity with the rules and regulations.

Fifth: Leases made by Osage adult Indians, who have certificates of competency, on their homestead al-

lotments, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Sixth: Leases made on the undivided interest of lands inherited by a white parent, or person, where the other interest is inherited by a noncompetent member of the Osage Tribe of Indians, unless approved by the Secretary of the Interior, and in conformity with the rules and regulations.

Seventh: Leases made by the purchaser of an undivided interest in what was formerly an Osage allotment, where the other interest is owned by a noncompetent member of the Osage Tribe of Indians, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Eighth: Leases made by the father of a minor Osage allottee who died intestate, where the mother of the minor is a white woman and the father a competent Osage Indian, and where the father purchased the undivided interest of the moth, the lease being made by the father, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Ninth: Leases made by a competent member of the Osage Tribe of Indians on undivided interest in lands inherited by them, the lease being made on the interest of such competent Indians, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Tenth: That it is unlawful for the lessee of an undivided interest in lands where the lease is taken from a white person, or an Osage Indian who has a certificate of competency, to take possession of said undivided interest and use the same, without first obtain-

ing a lease from the noncompetent Osage allottee who owns the other interest, in conformity with the rules and regulations, and with the approval of the Secretary of the Interior.

Eleventh: Leases made by heirs of a deceased allottee, in cases where the land was decided to the heirs, and not to the allottee, because of the fact that the allottee died before selecting allotment, that such lease was void unless made in accordance with the rules and regulations, and approved by the Secretary of the Interior.

Twelfth: That the United States has such an interest in lands which have been leased in conformity with the rules and regulations and with the approval of the Secretary of the Interior, and possession thereof being taken by the lessee, as to maintain an action in injunction against a trespasser on said lands for the benefit of the lessee.

The appellants contend that the act of Congress referred to, by its very terms, contemplates:

First: That members of the Osage Tribe of Indians shall be permitted to make leases upon their lands in such manner and in such form as they see fit, and that the responsibility for the making of the contract of lease shall rest upon the Indian, unhampered, unrestricted and uncontrolled by any rules and regulations of the Secretary of the Interior, subject only to the approval of the Secretary of the Interior in cases where the Indian has not received a certificate of competency and where the land is the Indian's restricted land.

Second: That where members of the tribe have certificates of competency such members may lease his

own surplus lands for grazing and agricultural purposes in such way as he sees fit, without the approval of the Secretary of the Interior, and may also lease the land of his minor children under such terms and conditions as he sees fit, without the approval of the Secretary of the Interior.

Third: That white parents of minor members of the Osage Tribe of Indians may lease the minor's lands, under such terms and conditions as they see fit, not beyond the minor's minority, without the approval of the Secretary of the Interior.

Fourth: That the heir of restricted lands from a noncompetent Indian, where such heir has a certificate of competency, or is a white person, may lease the lands so inherited, upon such terms and conditions as he sees fit, and without the approval of the Secretary of the Interior.

Fifth: That where lands are acquired by will, whether acquired by a noncompetent Osage allottee or an Osage allottee who has received a certificate of competency, or by a white person, such person may lease said lands in such manner and in such way as he sees fit, without the approval of the Secretary of the Interior.

Sixth: That the parents of minor members of the Osage Tribe of Indians, where the parents have not received certificates of competency, may lease the land of said minors in such manner and in such way as they see fit, without the approval of the Secretary of the Interior.

Seventh: That the heirs of deceased allottees, where the allottee died before making selection of an allot-

ment, and where the deed was issued to the heirs of such allottee, such heirs may lease the same without complying with the rules and regulations, and without the approval of the Secretary of the Interior.

Eighth: That the United States has no authority where lands have been regularly leased in accordance with the rules and regulations of the Secretary of the Interior, and with his approval, to maintain an action in injunction, to prevent trespass by a third person.

These are the propositions presented to the lower court by agreed statement of facts in this case, and upon which the court entered its decree, said decree being as follows:

"DECREE.

"Now, on this eighth day of November, 1917, this cause came on to be determined, the same being one of the regular judicial days of the special October Term of said court, held at Oklahoma City, Oklahoma; the plaintiff appearing by John A. Fain, United States Attorney, and by Redmond S. Cole, Assistant United States Attorney, and the defendants appearing by Leahy & Macdonald, their attorneys; and upon consideration of the pleadings and the agreed statements of fact, it was ordered and adjudged and decreed as follows:

"That the plaintiff has the right and the duty to enforce its policy towards the Osage Indians in the matter of alienating and leasing their lands, as contained in the legislation of Congress, which limits the power of allottees to alienate their allotments, where the restrictions upon alienation have not been removed, in conformity with the rules and regulations promulgated by the Secretary of the Interior, and further that this suit was properly brought for equitable relief.

"The court finds the defendants are leasing and taking leases of the allotments of minor members of the Osage Tribe of Indians, executed by the parents of said minors, in cases where one parent is a white person, and not a member of the Osage Tribe of Indians, and the other parent of the minor is a member of the Osage Tribe of Indians, to whom a certificate had been issued, under the Act of Congress of June 28, 1906; and that said leases are made without the approval of the Secretary of the Interior.

"It is ordered and adjudged and decreed that all such leases upon minor allottees' lands are invalid, unless approved by the Secretary of the Interior; and the defendants are hereby enjoined from leasing any lands of such kind and character, without the approval of the Secretary of the Interior, and from in any manner using or enclosing such lands, without the approval of the Secretary of the Interior.

"The court further finds the defendants have leased the allotments of Robert A. Lombard, Evart Che-she-wal-la and Andrew Pryor, all minor members of the Osage Tribe of Indians, whose fathers are dead, the said leases having been executed by the mothers of said minors, who are all white women, and not members of the Osage Tribe of Indians; and that said leases have not been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that said leases, and other leases upon lands of like kind and character are invalid, and the defendants are hereby enjoined from in any manner using or occupying lands of this character, or leasing same, or enclosing same, without the approval of the Secretary of the Interior.

"The court further finds the defendants have a lease upon the allotment of Hiram Taylor, a minor Osage allottee; that said minor allottee has a guardian, who was appointed by the County Court of Osage County, Oklahoma; that said lease was executed by the guardian

of said minor allottee, and duly approved by the County Court of Osage County, Oklahoma; that defendants have other leases executed by guardians of like kind and character.

"The court finds that said leases are valid, without the approval of the Secretary of the Interior, and it is, therefore, ordered and adjudged and decreed that an injunction upon this class of lands be, and the same is, hereby denied.

"The court further finds that the defendants have a lease upon the homestead allotment of Bessie Bruce, a member of the Osage Tribe of Indians, to whom a certificate of competency was issued under the Act of June 28, 1906, which lease was executed by the allottee after the delivery of the said certificate of competency, and was not approved by the Secretary of the Interior; that said lease is an alienation of the premises, and is in violation of the act of Congress above mentioned, and is invalid, without the approval of the Secretary of the Interior.

"It is, therefore, ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from leasing or occupying or using said homestead allotment of Bessie Bruce, without the approval of the Secretary of the Interior. The defendants are further enjoined from leasing, occupying or using any other homestead allotments of members of the Osage Tribe of Indians of like kind and character as the Bessie Bruce allotment, without the approval of the Secretary of the Interior.

"The court further finds the defendants have a lease upon the surplus allotments of Lena Bruce, a member of the Osage Tribe of Indians, and that said Lena Bruce has never received a certificate of competency.

"It is ordered, adjudged and decreed that said lease is invalid, and the defendants are hereby enjoined

from using said lands, or enclosing same, and from leasing said lands, or any other lands in Osage County of like kind and character, without the approval of the Secretary of the Interior.

"The court finds that the defendants have a lease on 160 acres of land allotted to Walter Harvey, deceased, a member of the Osage Tribe of Indians; that the heirs at law of Walter Harvey are Mary Harvey, his mother, an Osage Indian to whom a certificate of competency has not been issued, and his father, Luther Harvey, a member of the Osage Tribe of Indians, who has received a certificate of competency; that Luther Harvey mortgaged his one-half interest, and the mortgage was foreclosed, and R. C. Drummond, a white man, and not a member of the tribe, became the owner of an undivided one-half interest in said tract of land; that the said Luther Harvey had a right to alienate said one-half interest; that the lease held by the defendants is executed by Mary Harvey and R. C. Drummond, above mentioned, and was not approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the lease on the undivided one-half interest of said land by Drummond to the defendants is valid; and that the lease to the defendants by Mary Harvey, on the other one-half interest, is invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing said undivided one-half interest of Mary Harvey, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the south half of section twenty-eight (28), township twenty-seven (27), range seven (7), in Osage County, Oklahoma, executed by Antwine Hunt, as lessor; that the said land was allotted Harold R. Hunt, as a member of the Osage Tribe of Indians; that the said Harold R. Hunt died in infancy, leaving as his sole and

only heirs at law, his father, Antwine Hunt, who has never received a certificate of competency, and Hazel May Hunt, his mother, a white woman, not a member of the Osage Tribe of Indians; that said heirs at law suceeded to the land equally; that said Hazel May Hunt conveyed by warranty deed her interest to Joseph D. Mitchell, and the said Antwine Hunt purchased said undivided one-half interest from Joseph D. Mitchell, and is now the owner of the entire tract of land; that the undivided one-half interest of Hazel May Hunt was not restricted; that the said undivided one-half interest inherited by Antwine Hunt is restricted, and cannot be leased without the approval of the Secretary of the Interior.

"It is ordered, adjudged and decreed that the lease on the undivided one-half interest in said land which is restricted, as aforesaid, is invalid; and the defendants are hereby enjoined from leasing said restricted undivided one-half interest, without the approval of the Secretary of the Interior, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior, and that an injunction herein be denied as to the leasing or dealing with the other undivided one-half interest in said land.

"The court further finds that the defendants have a lease upon the allotment of Cecilia Rogers, a minor, a member of the Osage Tribe of Indians, executed by the father and mother of said minor; that the father and mother of said minor, prior to the execution of said lease, had both received certificates of competency, under the Act of June 28, 1906; and that said lease has not been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from occupying or using said lands, or in any manner dealing with said lands, or lands of like kind and character, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease on the lands allotted to Hun-kah, a minor, a member of the Osage Tribe of Indians, which lease is executed by the father of said minor; that the father has received a certificate of competency.

"It is ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from occupying or using, or in any manner dealing with said lands, or with lands of like kind and character, without the approval of the Secretary of the Interior.

"The court finds that the defendants have a lease upon the lands allotted to Tsa-pah-ke-ah, which lease has been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the said lease is valid and an injunction be, and the same is, hereby denied, as to said land.

"The court further finds that the defendants own an undivided four-ninths (4-9) interest in the lands described in the will as allotted to Wy-uh-ah-kah, deceased; that his estate has been administered in the County Court of Osage County, Oklahoma; that certain of his heirs at law are Hah-ah-me-tsa-he, who succeeded to an undivided one-third (1-3) interest; Grace Merril, who succeeded to an undivided one-ninth (1-9) interest, and Andrew Penn, who succeeded to an undivided one-ninth (1-9) interest; none of whom ever received a certificate of competency, under the Act of Congress of June 28, 1906; that the decedent was a noncompetent member of the Osage Tribe of Indians; that Jennie Gray and John Oberly, his other heirs at law, succeeded to an undivided four-ninths (4-9) interest in said property, and prior to inheriting said lands, these parties had received certificates of competency; and subsequently conveyed the undivided four-ninths (4-9) interest to the defendants; that all of said lands are the subject of an action for the partition thereof, which action is pending in the District Court of Osage County, Oklahoma; that Andrew Penn is dead, and his estate is

now being administered in the County Court of Osage County, Oklahoma; that the defendants are using said land, and are ready and willing to pay the other tenants in common their portion or share of the usable or rental value of the said lands.

"It is ordered, adjudged and decreed that the defendants own an undivided four-ninths (4-9) interest in said lands, and that the interest of the heirs at law, above set out, of the other five-ninths (5-9) interest, is restricted, and that the defendants be, and they are hereby enjoined from leasing said five-ninths (5-9) restricted interest in said land, without the approval of the Secretary of the Interior, and are enjoined from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior.

"The court further finds that certain lands mentioned in the will were allotted to Wah-tsa-moie, a member of the Osage Tribe of Indians; that he died without having received a certificate of competency, leaving as his sole and only heirs at law, Martha Pryor, and Michael Wah-tsa-moie, members of the Osage Tribe of Indians, neither of whom had received certificates of competency, and Harry Wah-tsa-moie, who was not enrolled as a member of the Osage Tribe of Indians, each of said heirs at law succeeding to an undivided one-third (1-3) interest; that Harry Wah-tsa-moie died intestate, and his mother, Martha Pryor, succeeded to an undivided one-third (1-3) interest inherited by him from his father; that said Harry Wah-tsa-moie, being a nonmember of the tribe, under the Act of April 18, 1912, restrictions from said interest were removed; that the defendants bought said undivided one-third (1-3) interest which was unrestricted, and are the owners thereof; that they are occupying the land with the consent of Martha Pryor, who is an adult, the other heir, Michael Wah-tsa-moie being a minor; that the defendants are able and willing to pay the portion of the usable value or the rental of said land due the other tenants in common; that the Secretary of the Interior

has not consented to the occupancy of said land by the defendants, and the defendants have no approved lease on the undivided two-thirds (2-3) interest in said land which was restricted.

"It is ordered, adjudged and decreed that the defendants are the owners of an undivided one-third (1-3) interest in said lands, and that Martha Pryor and Michael Wah-tsa-moie are the owners of an undivided two-thirds (2-3) interest in said lands, which said two-thirds (2-3) interest remains restricted under Section 4 of the Act of June 28, 1906; that the defendants and each of them are hereby enjoined from in any manner occupying or using the said lands, or any portion thereof, or from enclosing same, or in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior, or without procuring a lease upon the undivided one-third (1-3) interest which is restricted.

"The court further finds that the defendants are not using or dealing with the lands allotted to Wah-rah-lum-pah, mentioned in the bill, and are not leasing same, and no ground appears for an injunction, and it is therefore denied.

"The court further finds that the defendants have a lease upon the east half of the southwest quarter and the west half of the southeast quarter of section ten (10), township twenty-eight (28), range seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased, Osage allottee No. 770; that said allottee died intestate on August 3, 1907, and at the time of her death had not selected any land under the Allotment Act; that her sole and only heirs at law are Ho-ki-ah-se and Me-tsa-he, both adults and members of the Osage Tribe of Indians, and neither of said parties ever have received a certificate of competency; that said lease was executed by the said heirs, and was not approved by the Secre-

tary of the Interior; that the defendants have other leases upon lands of similar character.

"It is ordered, adjudged and decreed that said lands are subject to the restrictions under Section 4 of the Act of June 28, 1906, and that leases on said lands, and similar lands, are invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing or occupying, or in any manner dealing with said lands, or any other lands of like kind and character, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the northeast quarter of section fifteen (15), township twenty-eight (28), range six (6), in Osage County, Oklahoma, which land was allotted as surplus land to Jack Wheeler, Osage allottee number 728; that the said Jack Wheeler died testate on the 16th day of May, 1916, leaving a will, which has been legally admitted to probate by the County Court of Osage County, Oklahoma; that under the will of said decedent, Nah-me-tsa-he acquired said land as devisee; that the said devisee is a member of the Osage Tribe of Indians, and has never received a certificate of competency; that she leased said lands to the defendants, and that said lease was not approved by the Secretary of the Interior.

"The court finds the land is subject to administration in the County Court of Osage County, Oklahoma, under Section 3 of the Act of April 18, 1912, and to lease by the administrator, and that said administrator may collect the rents on said land, without the approval of the Secretary of the Interior, and that it does not appear herein that an administrator for said estate has been appointed.

"It is ordered, adjudged and decreed that the effect of the said will was to designate the successors, in lieu of those to whom the land would otherwise descend, under the laws of the State of Oklahoma, that the will

of Jack Wheeler did not remove the restrictions thereon, and the said Nah-me-tsa-he took said lands subject to all the restrictions against alienation, as provided for in the Act of June 28, 1906, and that the defendants, and each of them, he and they are, hereby enjoined from using or occupying or leasing, or in any manner dealing with said lands, or lands of similar character in Osage County, Oklahoma, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the northeast quarter of section nine (9), township twenty-five (25), range seven (7), in Osage County, Oklahoma, allotted to the heirs of Walter Florer, deceased, the lease being executed by a white man, not a member of the Osage Tribe of Indians, to whom Ke-ah-som-pah, the devisee named in the will of Kah-wah-e, had conveyed said land by warranty deed; that this land was allotted to the heirs of Walter Florer, deceased, under Act of Congress approved June 28, 1906, and Walter Florer was enrolled as a member of the Osage Tribe of Indians, and died intestate between January first, 1906, and June 28th, 1906, leaving as his sole and only heir at law Kah-wah-e; that neither Walter Florer, Kah-wah-e nor Ke-ah-som-pah ever received a certificate of competency, under the above act of Congress; that Kah-wah-e died, leaving a will, which was duly approved by the Secretary of the Interior, and which will, by the 15th paragraph thereof, provides:

"'All devises of real estate made hereunder are made subject to the condition that the real estate shall not be encumbered or alienated, without the consent of the Secretary of the Interior.'

that neither the deed nor the lease above mentioned were approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that under the Act of June 28, 1906, the lands allotted to the heirs of Walter Florer, deceased, were restricted, and said

heirs took the lands subject to the restrictions against alienation, the same as if the land had been selected by Walter Florer, and allotted to him during his lifetime; that said conveyance and said lease are invalid, and of no force and effect, without the approval of the Secretary of the Interior, and that the defendants, and each of them, be, and they are, hereby enjoined from using, conveying, enclosing or leasing the land above mentioned, or any other land of like kind or character, without the approval of the Secretary of the Interior.

"The court further finds the lands mentioned in the bill as allotted to Jesse James, are leased to H. G. Exell, under the departmental rules and regulations, which lease is approved by the Secretary of the Interior, and is valid, and that the rental due on said lease is paid.

"It is therefore ordered, adjudged and decreed that there is no duty imposed upon the plaintiff to protect the interests of said Exell, as lessee, and plaintiff is without authority to maintain this suit for injunction, so far as this land is concerned, that an injunction herein be, and the same is hereby denied, as to said land.

"It is further ordered, adjudged and decreed that the defendants and each of them, and their agents and employees, be, and they are hereby, enjoined from leasing for grazing and agricultural purposes, either directly or indirectly, in their own names or in the name of other persons, firms or corporations, and from dealing in leases on, using, occupying and enclosing for themselves or for others, any of the lands described in this decree as restricted lands, and all other lands in Osage County, Oklahoma, of like status and character, allotted to members of the Osage Tribe of Indians in Oklahoma, without the approval of the Secretary of the Interior.

"It is further ordered, adjudged and decreed that the costs of this action be taxed against the defendants.

"To said decree of the court, and every part thereof wherein the defendants, or either of them, are enjoined, the defendants, and each of them, except, and pray the court for an appeal from said decree to the Circuit Court of Appeals.

"To which decree, in refusing to grant plaintiff an injunction, as prayed for, the plaintiff excepts.

"It is further ordered that the appeal be, and the same is, hereby granted to the defendants, upon the giving by them jointly of a bond, conditioned as provided by law, in the sum of five hundred dollars.

"*Jas.* H. COTTERAL, *District Judge*

"O. K. REDMOND S. COLE,
"*Assistant U. S. Attorney.*

"O. K. LEAHY & MACDONALD.

"Endorsed: Filed in District Court November 8, 1917."

ERRORS COMPLAINED OF IN DISTRICT COURT

The errors complained of in the case are briefly as follows:

First: The court erred in finding and holding as a matter of law that the Act of Congress of June 28, 1906, above referred to, conferred upon the Secretary of the Interior the right and duty to promulgate rules and regulations governing the leasing of the lands of members of the Osage Tribe of Indians for agricultural and grazing purposes, and that the allottee and lessee were bound by such rules and regulations, and that the same

had the force and effect of law; and in not holding that the only authority conferred by such statute upon the Secretary of the Interior was the mere right of approval of such leases.

Second: The court erred in finding and holding as a matter of law that leases made by the white parent, the Indian parent being dead, on lands belonging to minor members of the Osage Tribe of Indians, were subject to the approval of the Secretary of the Interior, and must be made in conformity with his rules and regulations.

Third: The court erred in finding and holding as a matter of law that leases made by members of the Osage Tribe of Indians who had received certificates of competency, on the land belonging to the minor children of such persons, were subject to the approval of the Secretary of the Interior, and must be made in accordance with his rules and regulations.

Fourth: The court erred in finding and holding as a matter of law that leases of land by a noncompetent Osage allottee, on land belonging to his minor children, were subject to the approval of the Secretary of the Interior, and must be made in conformity with his rules and regulations.

Fifth: The court erred in finding and holding as a matter of law that leases made by parents of minor members of the Osage Tribe of Indians, where one of the parents was a white person and the other parent a competent Osage Indian, were subject to the approval of the Secretary of the Interior, and must be made in accordance with his rules and regulations.

Sixth: The court erred in finding and holding as a matter of law that lands coming to a noncompetent member of the Osage Tribe of Indians by will, duly approved by the Secretary of the Interior, from another noncompetent member of the Osage Tribe of Indians, in whom the lands were restricted, could not be leased by said devisee of the will except in accordance with the rules and regulations of the Secretary of the Interior, and erred in holding the Secretary of the Interior had the power to the terms as to alienation, or requiring the testator to incorporate a clause in said will preventing alienation without the consent of the Secretary, and erred in holding such clause in such will effective to prevent alienation, without the approval of the Secretary of the Interior.

Seventh: The court erred in finding and holding as a matter of law that the lessee of a person who owned an unrestricted undivided interest in Osage lands, where the other interest was held by a noncompetent member of the Osage Tribe of Indians, by inheritance or will, could not take possession of said undivided interest without first obtaining a lease from the noncompetent member of the Osage Tribe who held the other undivided interest, in accordance with the rules and regulations of the Secretary of the Interior, and upon his approval.

Eighth: The court erred in finding and holding as a matter of law that the owner of an undivided interest in lands inherited from a noncompetent member of the Osage Tribe of Indians, such owner being a white person, or a person not a member of the Osage Tribe of Indians, could not lease such undivided interest and put the lessee in possession thereof, without

such lessee obtaining an approved lease from the owner of the other interest.

Ninth: The court erred in finding and holding as a matter of law that lands partitioned to a noncompetent member of the Osage Tribe of Indians, which partition proceedings had been approved by the Secretary of the Interior, could not be leased except in conformity with the rules and regulations and with the approval of the Secretary of the Interior.

Tenth: The court erred in finding and holding as a matter of law that the lands allotted to the heirs of a deceased Osage allottee, where such deceased allottee died prior to selecting said allotment, and where the deed was issued to the heirs, could not make a valid lease on the same, except in accordance with the rules and regulations and with the approval of the Secretary of the Interior.

Decree of Circuit Court of Appeals.

These causes came on to be heard on the transcripts of the records from the District Court of the United States for the Western District of Oklahoma, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in these causes, be, and the same is hereby, modified in accordance with the terms of the opinion of this Court, and that as thus modified the decree of the said District Court in these causes be, and the same is hereby, affirmed without costs to either party in this Court; the costs in said District

Court to be assessed against the Defendants, George G. La Motte and Anna Marx La Motte.

January 30, 1919.

Assignments of Error.

Now, on this 21st day of November, 1917, came the above named defendants, by their solicitors, T. J. Leahy and C. S. Macdonald, and say:

That the Decree made and entered in the above entitled cause on the 8th day of November, 1917, against the defendants and in favor of the plaintiff, is erroneous and unjust to the defendants, for the following reasons:

First. The Court erred in not sustained the motion of the defendants to dismiss the Bill of Complaint of the plaintiff.

Second. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that leases made by the parents of minor Osage allottees, where one parent is a white person, and not a member of the Tribe, and the other parent holds a certificate of competency, are invalid unless approved by the Secretary of the Interior; and in enjoining the defendants from occupying or leasing such land, without the approval of the Secretary of the Interior.

Third. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the leases held by the defendants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said minors, the mothers being white persons, and nonmembers of the Tribe, and the fathers of said minors being dead, were invalid, without

the approval of the Secretary of the Interior, and the Court erred in granting an injunction in such cases.

Fourth. The Court erred in rendering a final Decree against the defendants, enjoining them from leasing homestead allotments of members of the Osage Tribe of Indians, where such member has received a certificate of competency.

Fifth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in granting an injunction against the defendants, enjoining them from dealing with the lands allotted to Walter Harvey, upon which the defendants have a lease from the white person owning an undivided one-half interest therein, and a noncompetent Indian owning the other undivided one-half interest; and the Court erred in enjoining the defendants from in any manner dealing with the restricted undivided one-half interest, without the approval of the Secretary of the Interior.

Sixth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from in any manner dealing with the undivided one-half interest, without the approval of the Secretary of the Interior, of the South Half of Section Twenty-eight (28), Township Twenty-seven (27), Range Seven (7), which land was owned by Antwine Hunt, an undivided one-half interest of which is alienable, without the approval of the Secretary of the Interior, and an undivided one-half interest of which is inalienable, without the approval of the Secretary of the Interior.

Seventh. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that the lands allotted minor Osage Indians could not be leased by the parents of such minors, where the parents have been issued certificates of competency, without the approval of the Secretary of the Interior.

Eighth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, or using or leasing, without the consent of the Secretary of the Interior, the lands allotted Hun-kah, a minor member of the Osage Tribe of Indians, where the father of said minor has a certificate of competency, and executes the lease without the approval of the Secretary of the Interior, and the mother is a noncompetent member of the Osage Tribe of Indians, and does not join in said lease.

Ninth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the lands allotted to Wy-u-hah-kah, a noncompetent member of the Osage Tribe of Indians, who died leaving competent and noncompetent heirs at law, were restricted lands, and the defendants, who were the owners of an undivided four-ninth's interest in said lands, could not use or occupy said lands, without the consent and approval of the Secretary of the Interior; and the Court erred in holding that the plaintiff could maintain this action, when the said lands were the subject of a suit pending in the District Court of Osage County, Oklahoma, for a partition thereof; and erred in holding that the defendants, who were tenants in common with noncompetent members of the Osage Tribe of Indians, could not lease, or occupy, or use said premises, without the consent of the Secretary of the Interior, or without an approved lease upon the restricted interest of said tenants in common.

Tenth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding that the plaintiff might maintain this suit against the defendants, who were the owners of an undivided one-third interest in the lands allotted to Wah-tsa-moie, deceased, a noncompetent member of the Osage Tribe of Indians, and erred in holding that the defendants, who were the owners of an undivided one-third interest, could not occupy or use said

premises, without the consent of the Secretary of the Interior, or without obtaining an approved lease upon the other undivided two-third's interest, which is owned by noncompetent members of the Osage Tribe of Indians.

Eleventh. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, using or leasing without the approval of the Secretary of the Interior, the East Half of the Southwest Quarter, and the West Half of the Southeast Quarter of Section Ten (10), Township Twenty-eight (28), Range Seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased Osage Allottee No. 707, and erred in holding that said lands were restricted, and that the heirs at law of said decedent, who are noncompetent members of the Osage Tribe of Indians, could not lease said lands without the approval of the Secretary of the Interior; and the Court erred in holding that the restrictions against alienation, under the Act approved June 28th, 1906, were applicable to other than living members of the Osage Tribe of Indians, who had selected lands under said Act.

Twelfth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from using, or occupying, and in holding the lease of the defendants invalid on the Northeast Quarter of Section Fifteen (15), Township Twenty-eight (28), Range Six (6), in Osage County, Oklahoma, without the consent of the Secretary of the Interior, or the approval of such lease by the Secretary of the Interior; and erred in holding that the will of Jack Wheeler, which was approved by the Secretary of the Interior, was not a removal of restrictions upon said lands; and erred in holding that the devisee under said will, took said lands subject to the restrictions under the Act of Congress of June 28th, 1906, against alienation; and erred in holding that the effect

of a will is to designate the successors, in lieu of those to whom the land would descend under the laws of descent and distribution, applicable to the Osage Tribe of Indians, and that the devisee in said will being a noncompetent member of the Osage Tribe of Indians, acquired said land subject to the inhibition against alienation, in the same manner as a noncompetent heir at law would succeed to said land.

Thirteenth. The Court erred in rendering a final Decree against the defendants and in favor of plaintiff, enjoining the defendant from occupying or using, or in any manner dealing with the Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), in Osage County, Oklahoma, without the consent or approval of the Secretary of the Interior; and erred in holding that the plaintiff had any authority to maintain this suit; and erred in holding that lands allotted to heirs of deceased members of the Osage Tribe of Indians were in any manner restricted, or that the heirs at law were restricted from alienating said land; and erred in holding that the restrictions against alienation, expressed in the Act of June 28th, 1906, applied to such lands; and erred in construing the Act of Congress of June 28th, 1906, to impose restrictions upon lands allotted to deceased members of the Tribe; and the Court further erred in holding that the will of Kah-wah-c, which was duly approved by the Secretary of the Interior, was not a removal of restrictions; and in holding that the Secretary of the Interior had authority, under the Act of Congress of April 18th, 1912, to prescribe terms, or require the testator to incorporate a clause in the will, prohibiting the devisee from alienating said lands; and the Court erred in holding that the clause in the will of Kah-wah-c had the legal effect of preventing the devisee from legally conveying her interest in said property, so devised; and erred in holding that the said clause 15, in the said will was of any force or effect, whatever.

Fourteenth. The Decree is contrary to both law and equity.

Wherefore, The defendants pray that the said Decree be reversed, and the District Court be directed to dismiss the complaint, and the defendants have all other relief which to the Court may seem equitable, just and proper, the premises considered.

T. J. LEAHY,

C. S. MACDONALD,

Solicitors for the Defendants.

(*Assignment of Errors of George G. La Motte et al. on Appeal to Supreme Court U. S.*)

Come now George G. and Anna Marx La Motte by their solicitors, T. J. Leahy, Esq., and C. S. Macdonald, Esq., and say that the decree rendered and entered in the above entitled causes on the 30th day of January, 1919, against the appellants, George G. and Anna Marx La Motte, and in favor of the United States of America, is erroneous and unjust to them for the following reasons:

First. The Court erred in modifying the judgment of the United States District Court for the Western District of Oklahoma in favor of appellants, by which judgment the lower court held that a lease upon minor Osage allottee lands made by a duly appointed qualified guardian and approval by the County Court was valid without the approval of the Secretary of the Interior, and in holding that such lease required the approval of the Secretary of the Interior.

Second. The Court erred in affirming the judgment of the United States District Court for the West-

ern District of Oklahoma in favor of the appellee and against the appellants.

Third. The Court erred in not reversing the decree of the United States District Court for the Western District of Oklahoma restraining the defendants from leasing lands as described in the decree.

Fourth. The Court erred in holding that there was a clear ground for equitable interference by the Government under the allegations of the bill.

Fifth. The Court erred in modifying the decree of the lower court and affirming the decree of the lower court as modified, and in holding and decreeing that leases made by a guardian duly appointed by the County Court of Osage County, Oklahoma, and said leases being approved by said court, were invalid without the approval of the Secretary of the Interior.

Sixth. The Court erred in holding that the Osage Allotment Act of June 28, 1906 (34 Statutes at Large, page 539), governed and controlled the questions at issue in this cause and that the Act of April 18, 1912 (37 Statutes at Large, Page 86), did not affect the questions at issue and was not controlled as to the guardianship cases in question and as to the questions upon lands acquired under will duly approved by the Secretary of the Interior under the provisions of the Act of April 18, 1912.

Seventh. The Court erred in not holding in favor of appellants and in decreeing that leases made by the parents of Osage minor allottees where one parent is a white person and not a member of the tribe and the other parent a member of the tribe and having a certificate of competency are invalid unless approved by the Secretary of the Interior and in affirming the judgment of the lower court enjoining the appellants from occupying or leasing such lands without such approval.

Eighth. The Court erred in affirming the decree of the lower court against appellants and holding that the lease held by appellants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said members, the mothers being white persons and nonmembers of the tribe, and the fathers of said members being dead, were invalid, without the approval of the Secretary of the Interior, and erred in granting an injunction in said cause.

Ninth. The Court erred in affirming the judgment of the lower court in enjoining the defendants from dealing with lands allotted to Walter Harvey upon which the appellants have a lease from a white person owning an undivided one-half interest therein and a non-competent Indian owning the other one-half interest, which lease was not approved by the Secretary of the Interior, and erred in holding that appellants could not use any part of said lands.

Tenth. The Court erred in affirming the decree of the lower Court against the appellants and in favor of appellee enjoining appellants from in any manner dealing with or occupying any portion of the lands in which appellants own undivided interest without a lease duly approved by the Secretary of the Interior from their tenants in common who were non-competent Indians.

Eleventh. The Court erred in affirming the judgment of the lower court enjoining the appellants from occupying or in any manner dealing with their undivided interest in lands allotted to a non-competent member of the Osage Tribe of Indians where such member died leaving competent and non-competent heirs at law, the appellants having purchased the interest of the competent heirs, the same being a four-ninths interest in said lands, and which land was the subject of a petition suit pending in the District Court of Osage County, Oklahoma, at the time the injunction was granted, and erred in holding that the appellants could not in any

manner deal with any interest in said lands by way of using or leasing their interest without a lease approved by the Secretary of the Interior.

Twelfth. The Court erred in affirming the decree of the lower Court in holding against the appellants and in favor of appellee in enjoining appellants from using or occupying the Northeast Quarter of Section Fifteen (15), Township Twenty-eight (28), Range Six (6), in Osage County, Oklahoma, and in holding the lease of the appellants invalid on said land without the approval of the Secretary of the Interior, and erred in affirming the lower court and in holding that the will of Jack Wheeler, which will was duly approved by the Secretary of the Interior and filed for probate, was not a removal of restrictions upon the alienation of the lands, and erred in holding that the United States had any interest in said lands which would warrant appellee in maintaining the suit, and erred in affirming the judgment of the lower court and holding that the devisee under said will, she being a non-competent member of the Osage Tribe of Indians acquired said lands subject to the restrictions provided for in the Act of Congress of June 28, 1906, against the alienation and that said devisee could not deal with said lands or alienate same without the approval of the Secretary of the Interior.

Thirteenth. The Court erred in affirming the decree of the lower court against the appellants and in favor of appellee, enjoining the appellants from occupying or using, or in any manner dealing with Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), described in the bill without the consent or approval of the Secretary of the Interior, and erred in holding that the United States had any authority or interest in said lands sufficient to maintain this suit, and erred in holding that lands allotted to the heirs of deceased members of the Osage Tribe of Indians were in any manner restricted or that the heirs at law could not alienate said lands without the approval of the Secretary

of the Interior, and erred in holding that the restrictions against alienation under the Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539) applied to such lands and the Court further erred in affirming the decree of the lower court in holding that the will of Kah-wah-e, which will was duly approved by the Secretary of the Interior and duly probated in the County Court of Osage County, Oklahoma, and the estate administered upon under the Act of Congress of June 28, 1912 (37 Statutes at Large, page 36), by the terms of which will and by the judgment of the County Court of Osage County, Oklahoma, the lessor of the above described lands acquired same was not a removal of restriction, and that the lessor of said lands could not deal with same without the approval of the Secretary of the Interior, and that a lease by the devisee of said lands under said will to the appellants was void unless approved by the Secretary of the Interior; that under the Act of Congress approved April 18, 1912, (37 Statutes at Large, page 36), the Secretary had authority to prescribe terms or require the testator to incorporate a clause in the will prohibiting the devisee from alienating said lands, and erred in holding that the clause in said will had the legal effect of preventing the devisee from legally conveying their interest in said property, as devised, without the approval of the Secretary of the Interior, and erred in holding that the clause in said will No. 15 was of any force or effect whatever.

Fourteenth. The Court erred in holding that the Government has retained control over all lands allotted under the Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539), and in holding that a non-competent member of the Osage Tribe of Indians cannot deal with, dispose of or alienate any lands allotted under said Act of Congress no matter from what source those lands come to such non-competent member without the approval of the Secretary of the Interior, and the Court erred in holding that the controversy is controlled

by the said Act of Congress and not by the Act of Congress of April 18, 1912 (37 Statutes at Large, page 86), and the Court erred in holding that the restrictions were not upon the lands but upon the person and that a non-competent Indian acquiring unrestricted lands by will could not lease said unrestricted lands without the approval of the Secretary of the Interior.

Fifteenth. The judgment and decree is both contrary to law and equity.

Wherefore, appellants pray that said decree be reversed and that said United States Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

T. J. Leahy,
C. S. Macdonald.

BRIEF AND ARGUMENT.

ERRORS No. 4, 14 and 15.

Fourth. The Court erred in holding that there was a clear ground for equitable interference by the Government under the allegations of the Bill. (Rec. p. 70.)

Fourteenth. The Court erred in holding that the Government has retained control over all lands allotted under Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539) and in holding that a non-competent member of the Osage Tribe of Indians cannot deal with, dispose of or alienate any lands allotted under said Act of Congress, no matter from what source those lands come to such non-competent member, without the approval of the Secretary of the Interior, and the Court erred in holding that the controversy is controlled by the said Act of Congress and not by the Act of Congress of April 18, 1912 (37 Statutes at Large, page 86), and the Court erred in holding that the restrictions were not upon the lands but upon the person and that a non-competent Indian acquiring unrestricted lands by will could not lease said unrestricted lands without the approval of the Secretary of the Interior. (Rec. p. 73.)

Fifteenth. The judgment and decree is both contrary to law and equity. (Rec. p. 73.)

We will not discuss the assignments of error in the order in which they are specified, but in the order in which it occurs to us that the propositions involved therein, naturally arise. Hence the departure in the following argument from following the assignments as specified.

The trial court held which was affirmed by the Circuit Court of Appeals that the appellee has the right and duty to enforce its policy toward the Osage Indians, in the matter of leasing their lands for agricultural purposes, and that the acts of Congress relating thereto limit the power of the allottees to lease or alienate their allotments, where the restrictions upon alienation have not been removed, except in conformity with the rules and regulations promulgated by the Secretary of the Interior. (See second paragraph of decree, p. 39, Transcript of Record.)

All of the other findings of the court upholding the contention of the appellee were to a large extent based upon the authority of the Secretary of the Interior to make and enforce rules and regulations with reference to leasing Osage Indian lands. The statute chiefly relied upon in this matter is Section 7 of the Act of Congress of June 28, 1906 (34 Stat. L. 545), which reads as follows:

"Sec. 7. That the *lands herein provided for* are set aside for the *sole use and benefit of the individual members of the tribe entitled thereto*, or to their heirs, as herein provided; and said members or their heirs shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and *said members shall have full control of the same, including the proceeds thereof*; provided, *that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority*; and provided further, that all leases given on said lands for the *benefit of individual members of the tribe entitled thereto*, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior."

It will be noted that this section of the statute relates to the question of the leasing of the lands allotted to members of the Osage Tribe of Indians. This statute is very dissimilar to other statutes concerning the leasing of lands by members of other tribes. It will be observed, from careful reading of the same, that Congress intended to give to the allottee the privilege and to throw upon him the responsibility of making leases. More than that, it gives to the allottee full control of the lands, including the proceeds from the same. In cases of minor members of the tribe, it gives to the parents full control and use of said minors' land, together with the proceeds thereof, until the minor arrives at his majority.

The Secretary of the Interior is given authority by this statute *only to approve leases* where they are made for the benefit of individual members of the tribe entitled thereto. It seems clear, from the reading of this statute, that Congress must have had in mind the necessity of educating the Indian in the handling of his lands and in making contracts concerning them, the one protection being given, and that is, whatever contract he might make must be approved by the Secretary, and this duty of approval was conferred upon the Secretary merely to guard against improvident contracts. The whole statute quoted carries with it the idea of the right of the Indian to make such contract as he wishes, subject only to approval, and he was not to be circumscribed or limited in the character of contracts he might make by rules and regulations. If it were intended that the Secretary should have the right to make rules and regulations, Congress would unquestionably either have said so, in plain terms or by implication, but instead of that it appears that Congress specifically lim-

ited the authority of the Secretary to the mere question of approval, for no other construction can be given to the word "only" found in the last line of said section.

As is well known, the Osage Indians are a wealthy people, and each member of the tribe has a large income. We assume that the court will take judicial notice of the fact that each member of the tribe had allotted to him or her approximately 659 acres, and in addition to that each member had set aside for him or her, as trust fund, nearly $3,817.00; that they have very valuable oil and gas interests, the same being reserved in the tribe by Section 3 of the act, which brings an immense revenue, so that the purpose of Congress in alloting the Osage Indians was not particularly to protect them from poverty, but also, because of their immense income, to give them an opportunity to be educated in handling their own affairs. As was said by the Supreme Court of the United States in the case of *McCurdy* v. *The United States*, decided March 4, 1918, found in L. C. P. Adv. Sheet of April 1, 1918, p. 288:

"Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property. The course necessarily involved the risk of some property being lost through improvidence. But in the case of the Osages the risk was not attended by serious danger. Even if the whole trust fund should be released and, despite supervision, improvidently spent, the legally competent allottee would still have his homestead and his share in valuable undivided oil, gas and coal rights; and the legally incompetent, his surplus lands in addition. There is nothing in the act or in the facts to which it applies that indicates a purpose to extend governmental control to property in which released funds may be invested."

The reasoning of the court with reference to the use that should be made of trust funds after being released might well be applied to the control of the Osage Indian over his lands, and the use he might make of the income from the same.

The Osage Allotment Act referred to and other acts of Congress relating to the Osages are proper to be taken into consideration in construing the above Section 7.

Section 3 of the Act of Congress of June 28, 1906 (34 Stat. L. 543), relates to the leasing of the mineral lands belonging to the Osage Tribe of Indians, and provides:

"That such leases may be made by the Osage Tribe of Indians, through its Tribal Council, with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe."

The first subdivision of Section 4 of said act provides for the payment of moneys due as interest to members of the Osage Tribe of Indians, and provides that the minor's money shall be paid to the parents until the minor arrives at the age of twenty-one years. No attempt is made to give to the Secretary of the Interior any control whatever over moneys paid to the members of the tribe, except in case of minor members, when the payment of the minor's share to the parent may be withheld if the parent is misusing or squandering the same. If it had been intended that the Secretary might circumscribe the authority of the allottee in making leases on his lands, by rules and regulations, evidently Congress would have said so, as it did say with reference to the making of mineral leases, or some control would have been provided for, as in the case of

parents who misused or squandered their children's annuities.

The Osage Allotment Act evidently was intended to cut just as many strings loose from the Osage Indian as was possible to cut loose, and his immense property rights made it unnecessary to throw around him the same absolute protection and guardianship of his property that exists among other Indian tribes.

Congress, in dealing with other Indian tribes, with reference to the making of leases on their lands, has seen fit to provide that the Secretary of the Interior shall control such leasing by rules and regulations.

Section 3 of the Act of February 28, 1891, amending the General Allotment Act of 1887 (26 Stat. L. 795), provides as follows:

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, or other disability, any allottee under the provisions of said act, or any other act or treaty, cannot personally and with benefit to himself, occupy or improve his allotment, or any part thereof, the same may be leased upon such *terms, regulations* and *conditions* as shall be prescribed by such Secretary, for a term not exceeding three years, for farming or grazing, or ten years for mining purposes."

Section 19 of the Act of Congress of April 26th, 1906, relates to the Choctaw and Chickasaw Nations of Indians, and provides as follows:

"Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such *rules* and *regulations* as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or

age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations."

Section 2 of the Act of Congress of May 27th, 1908, reads as follows:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor, or incompetent, for a period not to exceed five years, without the privilege of renewal; provided, that leases of restricted lands for oil, gas, or other mining purposes, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior, and not otherwise.*"

Apparently Congress, in dealing with the other Indian tribes in matters concerning the leasing of their lands, provided that the same should be done in accordance with the rules and regulations prescribed by the Secretary of the Interior; and in dealing with the Osages, Congress provided that the leasing of the mineral lands belonging to the tribe, should be in accordance with the rules and regulations prescribed by the Secretary of the Interior; but in dealing with the matter of the right of the Osage Indians to lease their allotments for farming or grazing purposes, not only omitted to provide that the same should be done in accordance with the rules and regulations, but provided unequivocally that such leases should be subject *"only"* to the approval of the Secretary of the Interior.

That the Secretary of the Interior understood Section 7 of the Act of Congress of June 28th, 1906, to give

greater rights to members of the Osage Tribe of Indians in the matter of leasing their lands for farming and grazing purposes, is evidenced by the following letter from the First Assistant Secretary, dated July 6th, 1912:

"Department of the Interior.
Washington.

July 6, 1912.

Land Contracts. R. J. H. Osage Leasing.

Mr. Homer Huffaker,
Fairfax, Oklahoma.

Sir:

The Department has received, by reference from Major McLaughlin, your letter of June 16, 1912, regarding leases made by Osage Indians and the payment of the rentals to the lessors direct.

The Department appreciates the difficulties to which you refer. The trouble, however, is not due to the regulations, but to the law which authorizes Osage Indians to lease their allotments.

Section 7 of the Act of June 28, 1906 (34 Stat. L. 539, 546), provides:

'That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease such lands for farming, grazing or other purposes not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; PROVIDED, That parents of minor members of the tribe shall have the control and use of said minor's lands, together with the proceeds of the same, until said minors arrive at their majority; AND PROVIDED FURTHER, That all leases given on said lands for the benefit of

the individual members of the tribe entitled thereto, or for the heirs, shall be subject only to the approval of the Secretary of the Interior.'

This law gives the Osage Indians much more extensive privileges with respect to the leasing of their land and control of the proceeds than the laws generally in force regarding other Indian lands.

Respectfully,

(Signed) SAMUEL ADAMS,
First Assistant Secretary."

As stated before, Congress had some definite purpose in view in using the word "only," and no other purpose can be ascribed to the use of this word than that it was intended that the Indian should be permitted to make his own contracts concerning the leasing of his lands, in his own way, and on his own terms, without being restricted or circumscribed by rules and regulations, subject *only* to the Secretary's approval.

It is contended that the powers conferred upon the Secretary of the Interior by the general Acts of Congress are sufficient to authorize him to make rules and regulations governing the leasing for agricultural purposes of Osage lands, then we still say that the very language of said Section 7, *supra*, is of such a nature and import as to negative the idea that Congress intended that the general powers of the Secretary might be brought into play in the way of making rules and regulations.

We don't deem it necessary here to discuss or cite authorities on the proposition that the Secretary of the Interior may only make such rules and regulations as are authorized by statute, for the reason that it is a matter that has been so often threshed out and passed upon by this court and others, that it will not be disputed,

we take it. If, then, our position is correct, that no authority was given by the Osage Allotment Act to the Secretary of the Interior to promulgate rules and regulations, and that he has no authority to do so, then whatever rules and regulations he might make would not be law, and would not be compulsory upon the allottee or the lessee to follow, and if the allottee or the lessee did not follow the rules and regulations promulgated by the Secretary of the Interior in this regard, there would be no violation of law, and there would be no cause for injunction on that account, and the appellee in this case would have no right to an order of injunction preventing the making of leaess not in conformity with the rules and regulations.

We admit that in cases where the Osage Indian had not received a certificate of competency, leases made by him on his allotted lands would be void unless approved by the Secretary of the Interior; and where the Indian had received a certificate of competency, leases made by him on his homestead allotment would be void unless approved by the Secretary of the Interior; and we also admit that the appellee would have the right, in cases where a lessee undertakes to take possession, or does take possession of allotted land under void leases, to obtain a writ of injunction, enjoining such lessee from the use and occupancy of such lands, but the duty of the Government to act commences when the lessee undertakes to take possession of land under void leases, and not when the contract or lease is being made.

Congress has specifically given to the Indian the right to make the lease, which carries with it, of course, the right of a white person to enter into a lease with the Indian. They have a right to get together upon

such terms as they may see fit, and to draw such contract as they may agree upon. Before attempting, however, to take possession of the lands embodied in a lease, they must seek the Secretary's approval. Clearly, the Secretary has no duty to perform, or authority over the matter, until after the lease contract is made between the allottee and the lessee, and the same is either submitted for approval to the Secretary of the Interior, or the lessee attempts to take possession of the land without the Secretary's approval.

If this is the correct position on the law, then so much of the decree of the court as is intended to enjoin the appellants from entering into leases with members of the Osage Tribe of Indians is error and ought to be reversed; and the Osage Indians ought to be given the right to handle their own affairs with reference to their lands, as is provided in the Osage Allotment Act of June 28, 1906.

ERRORS No. 7 and 8.

Seventh. The Court erred in not holding in favor of appellants, and in decreeing that leases made by the parents of Osage minor allottees, where one parent is a white person and not a member of the tribe, and the other parent is a member of the tribe and having a certificate of competency, are invalid unless approved by the Secretary of the Interior, and in affirming the judgment of the lower court enjoining the appellants from occupying or leasing such lands without such approval. (Record p. 71.)

Eighth. The Court erred in affirming the decree of the lower court against appellants and holding that the lease held by appellants upon lands allotted to

minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said members, the mothers being white persons and non-members of the tribe, and the fathers of said members being dead, were invalid, without the approval of the Secretary of the Interior, and erred in granting an injunction in said cause. (Record p. 71.)

Referring again to Section 7 of the Act of June 28, 1906, *supra*, it will be noted that the same provides:

"That parents of minor members of the tribe shall have the control and use of said minor's lands, together with the proceeds of the same, until said minors arrive at their majority."

This language is a proviso to the main part of the section. There is then this further proviso:

"That all leases given on said lands for the benefit of the *individual members of the tribe entitled thereto*, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior."

The language of this last proviso would indicate that it had special reference to the first part of Section 7, because the language is largely identical. The first part of the section specifies that the lands are *set apart for the sole use and benefit of the individual members of the tribe entitled thereto*. The last proviso above quoted says that *leases given on said lands for the benefit of the individual members of the tribe entitled thereto* shall be subject only to the approval of the Secretary of the Interior. "The individual member of the tribe entitled thereto" means undoubtedly the allottees, and in the case of parents, does not mean the parent of the minor, even though the parent be an allottee. We therefore urge that a lease by parents, of the minor's lands, need not be made in accordance with the rules and regulations

or be approved by the Secretary of the Interior. Involved in this controversy are several classes of parents, to-wit:

First. Indian parents who have not certificates of competency.

Second. Indian parents who have certificates of competency.

Third. Parents, where one of them is a white person, and the other an Indian with a certificate of competency; and,

Fourth. White parents, where the Indian parents are dead.

If the language of the statute would warrant it, there would be much reason in holding that where the parents have not certificates of competency, leases on the lands belonging to the minor children of such parents must be made in conformity with the rules and regulations, subject to the approval of the Secretary of the Interior; but it seems clear from the language of the statute, that the provisions of the first proviso are not subject to the provisions of the last proviso, and that the last proviso only has reference to the first part of the section. That a lease made by a white parent could not, it seems, under any construction of the statute, be held to be subject to the approval of the Secretary of the Interior, as it is not for the benefit of a member of the tribe, and when one parent is dead, we contend the other parent, under the law, is entitled to the use and benefit of the minor's lands; that if the living parent is white, the lease is valid without approval by the Secretary; if one dies, the estate continues in the other, analogous to estates in entireties (*Beddingfield* v. *Estill*

et al., 100 S. W. 108); and where the lease is made by a white parent, and there is also an Indian parent living, and the white parent alone makes the lease—the same not being joined in by the Indian parent, but is not resisted by the Indian parent, and is acquiesced in by such Indian parent—then there would be no necessity for approval by the Secretary of the Interior, and the United States would have no right to interfere with the possession of the lessee under such circumstances.

The Department have construed Section 7 of the Allotment Act, which provides that parents of minor members of the Osage tribe shall have control and use of the minor's land, together with the proceeds of the same, and have held for several years last past, that where one parent is dead, the living parent is entitled to the use and rentals of said minor's land; and under Departmental rules and regulations, the living parent makes the lease on said minor's lands. (*Levindale L. & Z. Co.* v. *Coleman*, 241 U. S. 60, Law Ed. p. 1080). In the opinion on page 1082, the court says:

"The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. This policy did not embrace white men—persons not of Indian blood—who were not, as Indians under national protection, although they might inherit lands from Indians; and with respect to such persons, it would require clear language to show an intent to impose restrictions."

The language of the act is plain, and to our minds does not evince any intention to require the approval of a lease made for the benefit of a white person.

The seventh subdivision of Section 2 of said Act of Congress of June 28, 1906, provides for the issuance

of certificates of competency by the Secretary of the Interior, to members of the tribe making application for the same, and further provides:

"That upon issuance of such certificates of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control and dispose of his or her lands the same as any citizen of the United States."

It would seem, by this language, that Congress intended that where a certificate of competency was issued to a member of the tribe, that such member was given greater liberties and greater rights with reference to handling his own affairs, than in cases where such certificates of competency were not issued, and it would be inconsistent to suppose that Congress intended that a parent who had a certificate of competency might have full management and control of his own allotted lands, but that his management and control of his children's allotted lands, particularly the matter of making leases thereon, should be subject to the approval of the Secretary of the Interior, and such rules and regulations as he might make.

However, as hereinbefore suggested, the Osage Allotment Act referred to was intended to afford opportunities to the members of the Osage Tribe to become used to handling their own business affairs, unrestricted and uncontrolled, and the same principl eis involved in the matter of the leasing of the minors' lands by the parents. The parent is not permitted to dispose of the lands. They remain the property of the minor. The parent is given the use, control and benefit of the minor's lands until said minor arrives at majority. He cannot lease them beyond the majority of the minor. Later, Congress, by Section 2 of the Act of April 18, 1912 (37 Stat. L. 86), in dealing with the question of

the minor Osage Indian estates, in the latter part of the section, uses this language:

"Provided, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents."

Evidently Congress had in mind in the enactment of this legislation that the parents had control of the estate of the minors, both the income as annuities and royalties, and the income from the lands, and if such parents were misusing or wasting the same, or if the estate was permitted to deteriorate in value, then it was made possible to have a guardian appointed over such estates. This provision is inconsistent with the contention of the Government that leases on said minors' lands, when made by the parent, is subject to the approval of the Secretary, and to his rules and regulations. The right to appoint a guardian over the estate of the minor, because of waste and misuse of the minor's estate by the parent, is inconsistent with the idea that the Secretary has control over said minor's lands. We do not think it was intended by said Section 7 of the Osage Allotment Bill that the Secretary should have any control whatever over leases made of minors' lands, but that the same may be made by the parents without regard to the approval of the Secretary, and this action will not lie, and the injunction granted in this case cannot stand as against such leases. We think the reason for this, however, is stronger with reference to white parents and parents having certificates of competency, but Congress has seen fit to give to all parents of minor Osages the right to lease their lands without any control or right of approval in the Secretary of the Interior—his authority being limited to leases made on the allottee's own land by the allottee.

ERRORS Nos. 12 and 13.

Twelfth. The Court erred in affirming the decree of the lower court in holding against the appellants and in favor of the appellee in enjoining appellants from using or occupying the Northeast Quarter of Section Fifteen (15) Township Twenty-eight (28), Range Six (6) Osage County, Oklahoma, and in holding the lease of the appellants invalid on said land without the approval of the Secretary of the Interior, and erred in affirming the lower court, and in holding that the will of Jack Wheeler, which will was duly approved by the Secretary of the Interior and filed for probate, was not a removal of restrictions upon the alienation of the lands, and erred in holding that the United States had any interest in said lands which would warrant appellee in maintaining the suit, and erred in affirming the judgment of the lower court and holding that the devisee under said will, she being a non-competent member of the Osage Tribe of Indians, acquired said lands subject to the restrictions provided for in the Act of Congress of June 28, 1906, against the alienation and that said devisee could not deal with said lands or alienate same without the approval of the Secretary of the Interior. (Record p. 72.)

Thirteeth. The Court erred in affirming the decree of the lower court against the appellants and in favor of the appellee, enjoining the appellants from occupying or using, or in any manner dealing with the Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), described in the bill, without the consent or approval of the Secretary of the Interior, and erred in holding that the United States had any authority or interest in said lands sufficient to maintain this suit, and erred in holding that lands allotted to the heirs of deceased members of the Osage Tribe of Indians were in any manner restricted, or that the heirs at law could not alienate the lands without the approval of the Secretary of the Interior, and erred in holding

that the restrictions against alienation under the Act of Congress approved June 28, 1906 (34 Statute at Large, page 539) applied to such lands, and the Court further erred in affirming the decree of the lower court in holding that the will of Kah-wah-c, which will was duly approved by the Secretary of the Interior and duly probated in the County Court of Osage County, Oklahoma, and the estate administered upon under Act of Congress of June 28, 1912 (37 Statute at Large, page 36), by the terms of which will and by the judgment of the County Court of Osage County, Oklahoma, the lessor of the above described lands acquired same, was not a removal of restrictions, and that the lessor of said lands could not deal with same without the approval of the Secretary of the Interior, and that a lease by the devisee of said lands under said will to the appellants was void unless approved by the Secretary of the Interior; that under the Act of Congress approved April 18, 1912 (37 Statute at Large, page 36), the Secretary had authority to prescribe terms or require the testator to incorporate a clause in the will prohibiting the devisee from alienating said lands, and erred in holding that the clause in said will had the legal effect of preventing the devisee from legally conveying their interest in said property, as devised, without the approval of the Secretary of the Interior, and erred in holding that the clause in said will No. 15 was of any force or effect whatever. (Record p. 72.)

We will consider these assignments together, because the lands devised in the Kah-wah-c will were lands allotted to the heirs of Walter Florer, deceased. There are two wills: the Jack Wheeler will and the Kah-wah-c will, both executed by non-competent members of the tribe; that is, members not having received certificates of competency, and the difference in the wills is that in the one the lands devised were allotted to a living member, and in the other, allotted to the heirs of

a deceased member; and in the Kah-wah-c will there is a clause, to-wit, Section 15:

"All devises of real estate made hereunder are made subject to the condition that said real estate shall not be incumbered or alienated without the consent of the Secretary of the Interior."

The Wheeler will has no limitation upon alienation. We think the learned trial judge and the Circuit Court of Appeals were in error in holding that a will duly approved by the Secretary of the Interior is not a removal of restrictions, but in effect simply a designation of the successors of the deceased, in lieu of those to whom the land would descend under the laws of the state. We urge that a will, approved by the Secretary, is an alienation, with his approval and consent, and as a matter of law amounts to a removal of restrictions.

We further urge that the court erred in holding that the limitation on alienation in the Kah-wah-c will was of any force or effect, conceding the Secretary of the Interior had the authority, under the Act of Congress of 1912, or was empowered to prescribe limitations as to alienation, and further, that the court erred in holding that the Secretary of the Interior has the power to prescribe terms as to alienation under said act.

Evidence, Record p. 38, par. 16.
Evidence, Record p. 40, par. 17.
Memorandum, Record p. 50, par. 16 and 17.
Decree, Record pp. 58 and 59.

Lands allotted to heirs of a deceased member of the tribe, we contend are unrestricted.

Walter Florer lands: Status of, see:
Evidence, Record p. 40, par. 17.
Memorandum, Record p. 50, par. 17.
Decree, Record p. 59.

The Wah-shah-me-tsa-he lands are also in this class.

Evidence, Record p. 37, par. 15.
Memorandum, Record p. 49, par. 15.
Decree, Record p. 57.

The Act of Congress of April 18, 1912 (37 Stat. L. p. 86, Sec. 8), provides:

"That any adult member of the Osage Tribe of Indians, not mentally incompetent, may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed by will, in accordance with the laws of the State of Oklahoma; Provided, that no such will shall be admitted to probate, or have any validity unless approved before or after the death of the testator, by the Secretary of the Interior."

The following authorities hold that a will is an alienation:

Taylor v. *Parker*, 235 U. S. 42, 59 L. Ed. 121.
Hayes v. *Barringer*, 168 Fed. 221, 93 C. C. A. 507.
Coachman v. *Sims*, 129 Pac. 845.

Words and Phrases, Volume 3, 1st Ed. Vol. 2, 2nd Ed., defines "dispose of" as follows: "'Dispose of' means to alienate to effectually transfer."

U. S. v. *Hocker*, 73 Fed. pp. 292 and 294.

"The word 'dispose' as used in the provision of a will, giving property to the wife to use and dispose of the same, as she may think proper, includes a conveyance absolute and in fee simple."

Woodbridge et al. v. *Jones et al.*, 67 N. E. 878, says:

"'Dispose of' means to part with, to relinquish, to get rid of, to effectually transfer."

The same act provides that no lands or moneys inherited from an Osage allottee shall be subject to, or be taken or sold, to secure the payment of any indebtedness incurred by an heir, prior to the time the lands or moneys are inherited. In considering this section of the act, our state district courts have held that a devisee is not protected by said exemption, as he takes not as an heir but acquires the property in a different manner, and the property which the devisee acquires is subject to the payment of his debts. The Comptroller of the Currency held in effect the same, *In re Thos. Mosier Estate*, Vol. 22, Comptroller's Opinions, p. 457.

The restrictions in the original Allotment Act of 1906, we urge, run only against the land selected by living members and their heirs, and the disposal of such lands by the allottee by will, with the approval of the Secretary of the Interior, is an alienation, and as effectual as a deed of conveyance made by the allottee, with the approval of the Secretary of the Interior. That in order to restrict said lands in the hands of the devisee, it would be necessary for Congress to say in the act authorizing the disposal of the lands by will, and in the absence of such a provision, the lands pass to the devisee unrestricted.

Bledsoe's Ind. Land Laws, 2d Ed., Sec. 62, says:

"As a general rule, and unless definite provision is made therefor by statute, tribal lands are not alienable, except to the United States, or with their consent. On the contrary, all allotted Indian lands which are not subjected to restrictions upon alienation, pass to the allottee free from such restrictions, and with full power of alienation.

"He who would assert that tribal lands are alienable must find legislative authority therefor. He who

would assert that allotted Indian lands are inalienable must be able to point to the agreement or statute, which either in express terms or by fair implication, restricts alienation. In other words, with tribal lands the rule is that they are inalienable; with allotted lands, that they are alienable.

"Much misapprehension in the interpretation of the allotment agreements and statutes has arisen from the assumption that allotted lands may not be alienated without express authority to that end, and while in reason and under authority, the rule is the reverse; that is, that they may be alienated unless legislative authority is found expressly, or by necessary implication, limiting or restricting such alienation."

The members of the Osage Tribe of Indians have all received deeds for their allotments, and they are the owners in fee simple of the lands, with limitation only against alienation, without the approval of the Secretary of the Interior, and subject to the mineral rights in the Osage Tribe of Indians. We maintain that all restrictions against alienation as to the allottee or his heirs do not apply to a devisee under a will, and as said by Bledsoe, "In the absence of legislative authority restricting alienation" such devisee may alienate the lands so taken by him without the approval of the Secretary of the Interior. We may say in passing that the Interior Department, up until the judgment of the Federal Court in this case, were of the opinion and held that a will was in effect a removal of restrictions, in that it was an alienation of property with the approval of the Secretary of the Interior, and that a devisee acquiring such property, although a non-competent member of the tribe, could alienate said property without the approval of the Secretary of the Interior. This question was submitted to them in the Mosier estate

above mentioned, and a deed submitted for approval, and the Secretary of the Interior held in that case, several years ago, that it was unnecessary to approve the deed made in that case, and in fact that he had no right to approve it, because the lands passing by will, duly approved, became unrestricted in the hands of the devisee. The question was later again submitted to the Secretary of the Interior, and the Department, after investigation, again passed upon the question, holding the same.

Rev. Laws Okla. of 1910, provides:

"Property is acquired, first, by occupancy; second, by accession; third, by transfer; fourth, by will, and, fifth, by succession."

In the case of *McCullough* v. *Smith*, 243 Fed. 823, in speaking of a mortgage executed by an Indian, with the approval of the Secretary of the Interior, the court said:

"If this mortgage had gone to foreclosure, it would have ultimately resulted in a complete alienation, and in this way the Secretary of the Interior approved a complete alienation, if it took place."

With reference to the clause in the Wah-wah-e will, we say, first, that the Secretary of the Interior was not empowered to insert such a clause in the will; second, if he was, or if the testator inserted such clause, that the same is merely directory, and that a violation thereof by the devisee, is of no consequence; that under said will the devisee takes a fee simple title, and that the particular clause is neither a limitation nor a condition, third, that conceding a limitation or conditon might be inserted in a will legally, we say that one that is inserted in this will is a nullity. On the proposition of

the authority of the Secretary of the Interior to insert such a clause in a will, we think the decision on the question of leasing, hereinafter cited, is applicable to this proposition, and as said in *Jennings* v. *Wood*, 192 Fed. 507, 112 C. C. A. 657:

"The jurisdiction of the Secretary of the Interior is only that expressed in the Acts of Congress."

On the proposition that the clause in the will is neither a limitation nor a condition and that the estate vests in fee simple in the beneficiary of the will, see:

4 Kent's Com. p. 126.
Conger v. *Love* (Ind.), 9 L. R. A. p. 65.
Fowlkes v. *Wagner*, 46 S. W. p. 586.
De Peyster v. *Michel* (N. Y.), 57 Am. Dec. 470.
Smithsonion Inst. v. *Meech*, 169 U. S. 398, 42 L. Ed. 793.

Section 6605 Rev. Laws Okla. provides:

"The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except as provided in Section 6608."

In construing a statute identical with the Oklahoma statute, in the case of *Fowler* v. *Duhme* (Ind.), 42 N. E. 623, the court said:

"Under the statute prohibiting the absolute power of alienation for a longer period than the duration of a life or lives in being at the creation of the estate, a provision in the devise in fee that the land should not be alienated for a stated number of years, which does not depend on the duration of any life or lives in being, and which is imposed merely for the supposed benefit of the devisee, is void."

We submit that the estate taken by the devisee under the Kah-wah-e will is in fee simple, and any clause attempting to restrict alienation is repugnant to the estate, and void.

Schouler on Wills, 5th Ed. Vol. 1, Secs. 598-602.
Devlin on Deeds, Vol. 2, Sec. 965.
Latermer v. *Waddell*, 3 L. R. A. (N. S.) 668.
Potter v. *Couch*, 141 U. S. 296, 35 Law Ed. 722.
Chappel v. *Frick*, 179 S. W. 203.

On the question as to whether or not lands allotted to the heirs of deceased members of the tribe are restricted, we call the court's attention to Section 1 of the Osage Allotment Act (34 Stat. at L. 539), which provides *inter alia*:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said rolls on January first, nineteen hundred and six, and all children whose names are now on said rolls, but who were born to members of the tribe whose names were on the said roll January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is declared to be the roll of said tribe, and to constitute the legal membership thereof."

The name of Walter Florer was on the roll January 1, 1906, and he would have been entitled to have received an allotment under the act passed June 28, 1906, had he lived until the deeds of conveyance were made to him under said act, but having died prior to the passage

of said act, the allotments he was entitled to were made and deeds of conveyance issued to his heirs. This is the land in question which is devised in the Kah-wah-e will. The other lands, to-wit: The Wah-shah-me-tsa-he lands, were allotted to the heirs of the deceased, who died after the passage of the Act of June 28, 1906, and before she had selected any lands under the provisions of said act. The only restrictions upon alienation found in the Allotment Act are in the fourth subdivision of Section 2, as follows:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and a certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

In the act it is thereafter provided for the issuing of a certificate of competency, and upon the issuing thereof the surplus lands become alienable. The act provides for the living members selecting the lands, and the restrictions against alienation under the plain terms of the act apply only to the lands selected by a living member and allotted to him in his own right. We do not believe it can be said that the act imposes restrictions upon alienation of this class of land, or that Congress intended to give a living member a homestead of 160 acres, non-taxable and inalienable until otherwise provided by Act of Congress, in his own right, and at the same time give the heirs of a deceased member 160 acres of land as a homestead of like kind and character. The Supreme Court of Oklahoma has passed upon this ques-

tion and construed the Osage Allotment Act in two cases:

Kenney v. *Miles*, 162 Pac. 775.
Fowler v. *Rogers*, 167 Pac. 635.

In the former, the court says:

"Act Cong. June 28, 1906, c. 3572, 34 Stat. at L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein reserved to the tribe, individual disposition of which is expressly inhibited."

Levindale Lead & Zinc Mining Co. v. *Coleman*, 241 U. S. 432.
Muller v. *United States*, 224 U. S. 448.
Skelton v. *Dill*, 235 U. S. 206.
Reed v. *Welty*, 197 Fed. 419.
Rentie v. *McCoy*, 35 Okla. 77, 128 Pac. 244.
Woodard v. *DeGraffenreid*, 238 U. S. 284.
Sizemore v. *Brady*, 235 U. S. 441.
Hancock v. *Mutual Trust Co.*, 24 Okla. 391, 103 Pac. 566.

In *Parkinson* v. *Skelton*, 33 Okla. 813, 128 Pac. 131, the Court holds:

"The word 'allottee' refers to parties to whom allotment is made. It cannot be well urged that a member of a tribe becomes an allottee until he selects his allotment. Prior to that time he is not an allottee; subsequent to that time he is, as to the lands set apart to him, an allottee."

Bledsoe v. *Wortham*, 35 Okla. 261, 129 Pac. 841.

ERRORS Nos. 9, 10 and 11.

Ninth. The Court erred in affirming the judgment of the lower court in enjoining the defendants from

dealing with lands allotted to Walter Harvey upon which the appellants have a lease from a white person owning an undivided one-half interest therein and a non-competent Indian owning the other one-half interest, which lease was not approved by the Secretary of the Interior, and erred in holding that appellants could not use any part of said lands.

Tenth. The Court erred in affirming the decree of the lower court against the appellants and in favor of the appellee, enjoining appellants from in any manner dealing with or occupying any portion of the lands in which appellants own undivided interest without a lease duly approved by the Secretary of the Interior from their tenants in common who are non-competent Indians.

Eleventh. The Court erred in affirming the judgment of the lower court, enjoining the appellants from occupying or in any manner dealing with their undivided interest in lands allotted to a non-competent member of the Osage Tribe of Indians, where such member died leaving competent and non-competent heirs at law, the appellants having purchased the interest of the competent heirs, the same being a four-ninths interest in said lands, and which land was the subject of a partition suit pending in the District Court of Osage County, Oklahoma, at the time the injunction was granted, and erred in holding that the appellants could not in any manner deal with any interest in said lands by way of using or leasing their interest without a lease approved by the Secretary of the Interior.

Under these assignments, which we will consider together, as we think the authorities applicable to all, and we call the court's attention to the following lands: The Walter Harvey lands were owned by R. C. Drummond, a white man, and Mary Harvey, a non-competent Indian, equally, as tenants in common. The owners of the lands executed a lease to the defendants, but the lease

of Mary Harvey, the non-competent, was not approved by the Secretary of the Interior. The defendants were in possession, with the consent of the owners of the lands, and the court restrained the defendants from in any manner dealing with the undivided one-half interest of the non-competent, without the approval of the Secretary of the Interior.

Evidence, Record p. 34, par. 7.
Memorandum, Record p. 47, par. 7.
Decree, Record p. 53.

The Hunt lease was upon lands owned by Antwine Hunt, a non-competent member of the tribe, who inherited an undivided one-half interest in said lands from his deceased child, and his wife inherited the other one-half interest, unrestricted. She sold her half interest, and Antwine Hunt subsequently purchased the half interest, thereby owning all of the lands; an undivided one-half interest was unrestricted. The defendants leased from Antwine Hunt, the lease being unapproved by the Secretary of the Interior. The defendants were enjoined from in any manner dealing with the restricted half interest.

Evidence, Record p. 35, par. 8.
Memorandum, Record p. 48, par. 8.
Memorandum, Record p. 54.

The Wy-u-hah-kah lands were partly restricted and partly unrestricted, and a partition suit was pending in the District Court of Osage County, Oklahoma, prior to the institution of the injunction suit by the United States, as was also pending in the County Court of Osage County, Oklahoma, the estate of Andrew Penn, the owner of a portion of said lands. The defendants were the owners of a four-ninth's interest in said lands, and were

in possession of the same and using the lands, and were able, ready and willing to pay the other tenants in common their share of the usable or rental value of said land. The court restrained these defendants from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior.

Evidence, Record p. 36, par. 12.
Memorandum, Record p. 48, par. 12.
Decree, Record p. 55.

The Wah-tsa-moie lands were allotted to the heirs of this party, and were owned by the defendants, LaMotte & LaMotte, owning a one-third interest; Martha Pryor, an adult incompetent, owning a one-third interest, and her minor child, Michael Wah-tsa-moie, owning a one-third interest.

Evidence, Record p. 37, par. 13.
Memorandum, Record p. 49, par. 13.
Decree, Record p. 56.

Martha Pryor consents to the defendants using this land, and the defendants are paying her her portion of the rental, and the court enjoins the defendants from using said lands or any portion thereof, or in any manner dealing with said lands or any part thereof.

In all of the above cases, the court will note that there are unrestricted interests, and the defendants either were the owners of the unrestricted interests or the lessees of such owners, and the rule applicable to tenants in common is applicable in these cases, notwithstanding some of the interests are restricted. In the case of the Hunt lease, it is unquestioned that he could lease an undivided one-half interest in the premises without the approval or consent of the Secretary of the Interior, and he leased this undivided one-half interest

to the defendants and was not complaining about their occupancy of the premises, and we submit as a proposition of law, if he did not desire to lease the other one-half interest through the Department, he was not compelled, under the law, to do so, and the Secretary of the Interior could not compel him to do so; and the defendants, having a valid lease on the undivided half interest, had a right to occupy the premises, especially with Hunt's consent, and the injunction should not have been granted. Each tenant in common is entitled to occupy the premises, and one cannot exclude the other by injunction. The only authority the Secretary of the Interior had was to approve or disapprove any lease that Hunt might submit.

38 Cyc., pp. 17 and 18:

"Each tenant in common is equally entitled to the use, benefit and possession of the common property, and may exercise acts of ownership in regard thereto, the limitation of his right being that he is bound to so exercise his rights in the property as to not interfere with the rights of his co-tenant, and neither an action at law nor in equity can ordinarily be maintained between co-tenants for the exclusive possession of the common property, or for the sole enjoyment of the profits thereof, even though the one in possession refuses to deliver sole possession to his co-tenant, or defendant forcibly took it from plaintiff's possession. If a tenant in common desires to have sole and exclusive possession of his interest in the common property, he can only seek his remedy in partition. It is competent for tenants in common to agree among themselves that one of them shall have sole or exclusive possession of the common property, and such an agreement is valid and enforceable."

38 Cyc., pp. 104 and 105:

"A tenant in common may lease his share of the common property, and the lessee, on entry, will have the same right in relation to the other co-tenant that his lessor had."

There is no charge of fraud or unfair dealing with the noncompetent tenant in common.

The evidence shows that the co-tenants of the defendants were not in any way being injured or objecting to the occupancy or use of the premises by the defendants, and that the defendants were ready, able and willing to account to their co-tenants for rent money or profits. No evidence showing that the noncompetent Indian tenants were in any way being interfered with, and the injunction had the effect of depriving the defendants of the use of the property in which they owned an interest, and placed upon them the burden of procuring an approved lease from the Secretary of the Interior on the interest of their noncompetent Indian co-tenant. We urge that the injunction enjoining the defendants from occupying their own property, or in any manner dealing with property they had an interest in, is depriving them of property without due process of law, and placing it within the power of the Secretary of the Interior to do so, by refusing to approve a lease to them or to their lessee. It will not do to say that the Secretary of the Interior will not act arbitrarily and refuse to approve a lease to a white man who owns an undivided interest in lands, where he is willing to pay the reasonable rental value thereof.

The question is, can the courts legally put this requirement upon a man who owns an interest in lands, and say to him that he cannot occupy them unless his noncompetent tenant in common submits a lease to the

Secretary of the Interior for approval and the Secretary of the Interior approves such lease. The facts are, that in this case the Department refused to approve leases either to the defendants or to their lessees, and the injunction had the effect of forcing the defendants to lease their lands to whomsoever the Secretary of the Interior might see fit to approve a lease. The act of Congress does not give the Secretary of the Interior jurisdiction to initiate a lease, and we maintain that the lessee, being a noncompetent Indian, who owns interest in lands which he cannot alienate, with a white tenant in common, whose interests are alienable, can make an arrangement whereby the white tenant can occupy the premises without the consent of the Secretary of the Interior; and that in cases where white tenants in common with noncompetent Indian tenants in common are using lands of this class and character, with the consent of their noncompetent Indian tenant in common, neither the Secretary of the Interior nor the United States has any authority to interfere simply because the white tenant in common or his lessee has not procured an approved lease upon the restricted interest of the other tenant in common.

Under the Act of Congress of June 28, 1906, it is provided that the members or their heirs shall have the right to use and to lease the lands for farming and grazing purposes, and said members shall have the full control of the same, including the proceeds thereof. Certainly this does not preclude a member of the tribe from obtaining the benefits and use of his property, except by lease approved by the Secretary of the Interior, and we urge that the fact that the lease was made by the Indian upon the restricted interest, which lease was

not approved by the Secretary, would not entitle the government to an injunction, where the white tenant in common, or his lessee, was in possession of the lands with the consent of the Indian owning an unrestricted interest therein.

ERRORS Nos. 1, 5 and 6.

First. The Court erred in modifying the judgment of the United States District Court for the Western District of Oklahoma in favor of appellants, by which judgment the lower court held that a lease upon minor Osage allottee's lands made by a duly appointed, qualified guardian and approved by the County Court, was valid without the approval of the Secretary of the Interior, and in holding that such lease required the approval of the Secretary of the Interior.

Fifth. The Court erred in modifying the decree of the lower court, and affirming the decree of the lower court as modified, and in holding and decreeing that leases made by a guardian duly appointed by the County Court of Osage County, Oklahoma, and said leases being approved by said court, were invalid without the approval of the Secretary of the Interior.

Sixth. The Court erred in holding that the Osage Attlotment Act of June 28, 1906 (34 Statutes at Large, page 539), governed and controlled the question at issue in this cause, and that the Act of April 18, 1912, (37 Statutes at Large, page 86) did not affect the questions at issue and was not controlled as to the guardianship leases in question, and as to the questions upon lands acquired under will duly approved by the Secretary of the Interior under the provisions of the Act of April 18, 1912.

Errors 1, 5 and 6 deal primarily with the proposition as to what is meant by the Act of Congress of Apr.

18, 1912 (37 Stat. L. p. 86), and as to what extent said Act of Congress amended the Act of Congress of June 28, 1906 (34 Stat. L. p. 545.)

The trial court held that under the authority given in the Act of Congress of Apr. 18, 1912, supra, guardians with the approval of the County Court, could make a valid lease on the lands of orphan minors and incompetents. The Circuit Court of Appeals reverses the trial court in this matter, and to that extent, only, modifies the decree of the District Court.

As supporting appellants' position in this matter see:

Rev. Laws Okla., Sec. 6569.
Duff et al. v. *Keaton et al.*, 33 Okla. 92, 124 Pac. 291.
Bailey v. *King*, 157 Pac. 763; rehearing, p. 766.
Fisher v. *McKeeme*, 143 Pac. 850.
Bates' Guardian v. *Dunham*, 12 N. W. 309.
Los Angeles Co. v. *Winans*, 109 Pac. 649, Syls. 26-27.
Morrison v. *Burdette*, 154 Fed. 617, 83 C. C. A. 391.
Jennings v. *Ward*, 192 Fed. 507, 112 C. C. A. 657.
Midland Oil Co. v. *Turner*, 179 Fed. 74, 102 C. C. A. 368.
Turner v. *Seep*, 167 Fed. 646, 102 C. C. A. 368.

Errors 2 and 3 are necessarily covered by the foregoing arguments, and it is not necessary, as we view the matter, to submit any separate argument covering said assignments.

We therefore respectfully urge that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, should be reversed, and this cause re-

manded to said Court, with instructions to reverse the judgment of the United States District Court for the Western District of Oklahoma, and to enter judgment in favor of these appellants.

Respectfully submitted,

T. J. LEAHY,

C. S. MACDONALD,

Counsel for Appellants.

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CITATIONS.

STATUTES.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

GEORGE G. LAMOTTE AND ANNA MARX LAMOTTE, *appellants*,
v.
THE UNITED STATES OF AMERICA.
No. 121.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States brought suit in the United States District Court for the Western District of Oklahoma against George G. LaMotte and Anna Marx LaMotte to enjoin them from entering into leases with noncompetent Osage Indians, by any means or manner other than that prescribed by the Secretary of the Interior, and from using, occupying, or exercising any control over, or subleasing, any lands as to which they had procured such unauthorized leases.

The approved form of lease and the rules and regulations covering such leases, both of which it

was alleged were disregarded by these defendants, were set up as Exhibit A to the bill. R. 7–15. They were promulgated by the Secretary of the Interior pursuant to section 12 of the Act of June 28, 1906, ch. 3572, 34 Stat. 539, 545, by which the Secretary was given authority to do all things necessary to carry into effect the provisions of that Act. Section 7 of the Act provided for leasing Osage lands for grazing or agricultural purposes, but required such leases to have the approval of the Secretary.

The defendants were engaged in the business of procuring from noncompetent Osage Indians leases of lands allotted to them and subleasing to clients desiring large pastures for grazing or fields for agricultural purposes, whom they would put in possession and guarantee against any claims which might be brought against them by reason of occupancy under the subleases. The leases which the defendants procured were not in the form approved by the Secretary of the Interior, the regulations were not complied with, nor were the leases submitted to him for approval. The business thus carried on interfered with and prejudiced the Secretary of the Interior in leasing these lands under the regulations promulgated by him. So extensive had the operations of defendants become (it was alleged that they had procured leases to more than 25,000 acres) that the Secre-

tary of the Interior had notified them to desist from their practices and had informed them that leases such as they had taken would not receive his approval.

A motion to dismiss the bill of complaint was interposed (R. 15–16), the grounds of which were: (1) That the noncompetent Osage Indians for whose benefit the action was brought were not joined as parties plaintiff; (2) the lack of interest of the United States in the subject matter; (3) that the matters sought to be enjoined were authorized by law; and (4) that there was an adequate remedy at law.

This motion was denied (R. 16) and answer was then filed (R. 16–23), which, while admitting the procuring of most of the leases specified in the bill of complaint, asserted that such leases were valid, and that the Secretary of the Interior was without authority to control leases procured as these had been. Certain other leases typical of a number which had been secured by the defendants were set forth and like allegations made as to their validity and the lack of authority of the Secretary.

The answer concluded with a prayer that leases such as those taken be decreed valid; that the Secretary of the Interior be decreed to be without authority under the law to promulgate rules and regulations concerning leasing of lands of members of the Osage Tribe, and that there be a definition and determination of the rights of the Secretary

of the Interior as to approval of farming and grazing leases of lands of such members.

Upon the case presented by the pleadings and shown by the evidence (R. 23–33), the District Court found and decreed invalid, without the approval of the Secretary of the Interior, leases of the following kinds taken by the defendants (Memo. of Rulings, R. 34–38; Decree, R. 38–45):

1. Leases of allotments of minor Osages, executed by their parents, one of whom is a white nonmember of the tribe, the other a member to whom a certificate of competency had issued under the Act of June 28, 1906. Memo. of Rulings, par. 2, R. 34, 35.

2. Leases of allotments of minor Osages, executed by the surviving parent, white nonmember. Memo. of Rulings, par. 3, R. 35.

3. Lease of homestead allotment of adult member who has certificate of competency. Memo. of Rulings, par. 5, R. 35.

4. Lease of allotment of adult member to whom no certificate of competency has issued. Memo. of Rulings, par. 6, R. 35.

5. Lease of allotment of minor Osage, executed by parents, both of whom had certificates of competency. Memo. of Rulings, par. 9, R. 36.

6. Lease of allotment of minor Osage, executed by father who had certificate of competency, recognized by Secretary as proper person to make lease. Memo. of Rulings, par. 10, R. 36.

7. Lease of allotments of noncompetent adult heirs, whose decedent died intestate before selection of allotment. Memo. of Rulings, par. 15, R. 37.

8. Lease of allotment by a noncompetent Osage, the devisee of allottee under will approved by the Secretary of the Interior, legally probated. Memo. of Rulings, par. 16, R. 37, 38.

9. Lease by white man, the transferee of a noncompetent devisee who took under a will of a sole heir at law, a noncompetent Osage, containing a provision restricting alienation or encumbrance of lands devised thereunder, without approval of the Secretary of the Interior. Memo. of Rulings, par. 17, R. 38.

10. Leases by noncompetent heirs. Memo. of Rulings, pars. 7, 8, 12, 13, R. 35–37.

(Paragraph 13 covers case of permissive occupancy of portion of land, no formal lease existing. The effect of the ruling is the same as if formal lease executed.)

There were certain tracts of the whole of which defendants held possession; these were claimed by them either (1) as owners of an undivided part thereof and by lease of the balance, or (2) by lease entirely; the validity of the undivided purchased interest was not questioned, but the validity of the lease covering the balance was denied because that interest was restricted. As to those held by lease, the lease was assailed as invalid as to the undivided restricted interest only. The court held the defendants entitled to possession and occupancy as

to the undivided interest conceded or held to be valid, but not as to the restricted interest. Memo. of Rulings, pars. 7, 12, 13, R. 35–37.

The basis of these various rulings was that the lands as to which the leases were declared invalid were, under the Act of June 28, 1906, restricted and not subject to lease or alienation without the Secretary's approval.

The court further found and decreed *valid* without approval of the Secretary of the Interior, leases made:

(*a*) By a noncompetent heir, of an interest acquired from a competent or unrestricted ancestor (interest of Martha Pryor as heir of Harry Wahtsa-moie). Memo. of Rulings, par 13, R. 37.

(*b*) By a noncompetent, of an interest purchased from one who was competent to convey. Memo. of Rulings, par. 8, R. 36.

(*c*) By duly appointed guardians of minor allottees or heirs, which leases had been approved by the proper county court. Memo. of Rulings, par. 4, R. 35.

It also held as to lands claimed by one Ezell under lease duly approved by the Secretary, and which had been trespassed upon by defendants' cattle, that the lessee had a right of action and that there was no duty on the Government to sue on his behalf. Memo. of Rulings, par. 18, R. 38.

An injunction was awarded against the defendants as to leases held invalid, and it was further

decreed that they be enjoined from leasing for grazing or agricultural purposes, or dealing in leases on, using, occupying, and inclosing without the approval of the Secretary, any of the lands held restricted in the decree, and all other lands in Osage County of like situation and character, allotted to Osage Indians.

From the decree entered an appeal was filed by defendants and a cross-appeal by the Government, the latter alleging error as to the Ezell lease and as to the holding that leases by guardians, approved by the proper county court, were valid. R. 55. The two cases presented by the appeal and cross-appeal were by stipulation consolidated and briefed as one case in the Court of Appeals. R. 58.

The Circuit Court of Appeals modified the decree of the lower court and, as modified, affirmed it. R. 68; Opinion, R. 59–68; 256 Fed. 5.

The modifications were that leases by guardians approved by the County Court were invalid without approval by the Secretary of the Interior; that noncompetent Osages, regardless of the source of their title, could not lease without the Secretary's approval; that where there were undivided interests in lands, part of which were restricted, leases of such restricted interests and occupancy thereof could be had only with the approval of the Secretary of the Interior and that the use and occupancy of such undivided interests were subordinate to the preservation of the restricted estate.

The appeal of defendants brings the case to this court and presents all the questions passed upon by both courts below with the exception of the Ezell lease, which is now out of the case, as the Government acquiesced in the judgment of the Circuit Court of Appeals as to that lease.

PROPOSITION.

The decree of the Circuit Court of Appeals was right and should be affirmed.

In an endeavor to aid in the consideration of the case, we make the following classification of the lands, the right to lease which is here drawn in question:

1. Noncompetent adults, which they hold—
   - (*a*) as allottees;
   - (*b*) as heirs or devisees from (1) noncompetent, or (2) competent testator or intestate;
   - (*c*) as purchasers.
2. Minors, leased by—
   - (*a*) (1) noncompetent, or (2) competent parents who are members of the tribe;
   - (*b*) parents who are white nonmembers;
   - (*c*) guardians duly appointed.
3. Competent adults, held as homestead;
4. Lands held in common.

ARGUMENT.

The legislation respecting the Osages has been considered by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, in *McCurdy* v. *United*

States, 246 U. S. 263, and in *Kenny* v. *Miles,* 250 U. S. 58.

Both the Act of June 28, 1906, ch. 3572, 34 Stat. 539, and the Act of April 18, 1912, ch. 83, 37 Stat. 86, clearly evince the intention of Congress that broadly the Osages in their lands and tribal funds were to be restricted for 25 years.

In the *McCurdy* case, *supra,* the intent and effect of this legislation was succinctly stated (pp. 265, 266):

> Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation. By act of June 28 1906, 34 Stat. 539, it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which would thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (secs. 4 and 5). The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also the remaining lands, after setting aside enough for county use, school sites, and other small reservations. The oil, gas, coal, and other mineral rights were reserved to the

> tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and nontaxable for twenty-five years or until otherwise provided by Congress. All other allotted lands, which were known as "surplus lands," were made inalienable for twenty-five years and nontaxable for three years, except that power was vested with the Secretary of the Interior to issue to any adult member, upon his petition, a certificate of competency, authorizing him to sell all of his surplus lands; and upon its issue all his surplus lands became immediately taxable.

The main modification of the general policy of restriction is contained in section 2 of the Act of June 28, 1906, which (in the seventh paragraph, p. 542) authorizes the Secretary of the Interior, in his discretion, to issue a certificate of competency to any adult member of the tribe by virtue of which such member may sell and convey his lands, except the homestead, and shall "have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

But this discretionary authority to declare competency, and the right conferred by receipt of a certificate of competency, were expressly declared not to authorize the sale of the minerals in the lands, but these minerals were reserved for the 25-year period.

The other exception to alienation is that contained in section 7 of the same Act (p. 545), which

authorizes leases; this is the enactment with which we are principally concerned in the instant case, as will appear from the discussion a little later on.

There is nothing in the Act of April 18, 1912, which indicates any intent upon the part of Congress to place the disposition or alienation of the property of the Osages beyond the jurisdiction or supervision of the Secretary of the Interior.

While section 3 of that Act provides for the placing of the property of deceased orphans, minors, insane, and other noncompetent allottees of the tribe in probate under the jurisdiction of the county courts of Oklahoma, yet the section specifically provides that no land shall be sold or alienated without the approval of the Secretary of the Interior.

All through the Act of 1912 provision is made for supervision by the Secretary of matters pertaining to the lands of these allottees, manifesting most unequivocally the purpose of Congress to have the Secretary of the Interior look after their welfare.

With this brief survey of the legislation we come to the particular part of the Act of 1906 involved in this case, namely, section 7, which reads:

> That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have

> the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

And section 12, providing:

> That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

1. Leases of lands of noncompetent adults.

(a) ***Lands which they hold as allottees.***

It is impossible to read the language of section 7 and reach any conclusion other than that the Secretary of the Interior is given control over the leasing of lands held by noncompetent adults *as allottees.* Class 1 [a], p. 8. Appellants concede this in their brief, p. 43.

(b) *Lands held as heirs or devisees.*

It is equally clear that lands held by *noncompetents as heirs or devisees* can not be leased without approval by the Secretary of the Interior.

(1) From noncompetents.

As to lands coming to such *noncompetents* from *noncompetent* decedents (class 1 [b–1], p. 8), it is plain that the power of the noncompetent heir to make a lease thereof is limited in the same way and to the same extent as that of his noncompetent ancestor. In principle no distinction exists between the two and the statute relating to the Osages recognizes none. Leases made by all noncompetent members on restricted lands stand on the same footing, regardless of the source of title. The language of the statute plainly requires the approval of the Secretary with respect to all leases given on restricted lands by or for the benefit of individual members, " or for their heirs."

As was said by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 438:

> * * * it would be an inadmissible construction of this section [sec. 7] to say that the word "heirs " was there used in contradistinction to " members." This provision as to leases, in the light of the purpose of the act, had reference we think to the " individual members " who received allotments and the Indian heirs of such members.

(2) From competent decedents.

Regarding lands inherited by *noncompetent* heirs from *competent* decedents (class 1 [b-2], p. 8), it is argued by appellants that as a competent Osage under section 2 could use his property as a citizen he could lease without approval by the Secretary; that that privilege ran with the land and hence a noncompetent heir could do likewise.

But the whole tenor of the legislation with respect to the Osages negatives that assertion. As we have already said, the clearly expressed intent and effect were to restrict the land except as to those who received certificates of competency. Competency under the statute is a personal status; the qualifications for it are plainly expressed in the Act of 1906. To entitle a member to a certificate of competency it must appear that he has ability to transact business and to care for his individual affairs. The legislation relating to the Osages looks to the personal qualifications and not to the blood status of the individuals concerned. In this respect it differs from Acts relating to the Five Civilized Tribes, notably the Act of May 27, 1908, ch. 199, 35 Stat. 312. The determination of the question of competency is left to the discretion of the Secretary of the Interior, and the emancipation of any Osage depends upon his own personal qualifications in the particulars specified in the Act. Compare *Levindale Lead Co.* v. *Coleman*, *supra*.

A provision in the supplementary Act of April 18, 1912, is significant in this connection. Section 6 of that Act (37 Stat. 87) provides that the lands of deceased Osage allottees may be partitioned or sold under proper order of a competent court under the laws of Oklahoma, and that where the *heirs* have certificates of competency or are non-members of the tribe, the restrictions on alienation are removed. Conversely, restrictions on alienation are *not* removed in the case of heirs who do not hold competency certificates.

The fact that the lands were subject to sale and alienation in the hands of the competent members would not preclude Congress from imposing restrictions with respect to the alienation of such lands after the same have passed to a noncompetent heir. The power of Congress in this regard is well settled. *Brader* v. *James*, 246 U. S. 88, 96.

The welfare and proper supervision of noncompetent Indians has been the constant concern of Congress in its legislation, and in the absence of a clearly expressed determination to depart from such policy all doubts should be resolved in favor of the continuance of supervision.

In *Kenny* v. *Miles*, 250 U. S. 58, this court, in considering the status of heirs of Osages and their rights, and in speaking of the legislation respecting them, said (p. 64):

> Under the act of 1906 the death of a member entitled to an allotment does not

extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. The restrictions are imposed by another provision equally comprehensive, and it makes no distinction between lands allotted to living members and those allotted in the right of deceased members. *Nor is any such distinction made in the section dealing with descent. The heirs are generally Indians, and seldom white men. When they are Indians they are equally within the occasion for the restrictions, whether the allotment be to a living member or in the right of one deceased, Talley* v. *Burgess*, 246 U. S. 104, 108; and in either case some may be without any allotment of their own, because born after the time for closing the roll. Thus those who take under allotments made in the right of deceased members are no less within the letter and spirit of the restrictions than are other heirs. *That all are intended to be protected is shown by the leasing provision, which requires that "all leases" on the part of heirs shall have the approval of the Secretary of the Interior.*

The act of 1906 is quite unlike the earlier acts considered in the cases of *Mullen* v. *United States*, 224 U. S. 448, and *Skelton* v.

Dill, 235 U. S. 206, which are cited in support of the conclusion below. Those acts, as was pointed out in our opinions, contained separate provisions for two classes of allotments—one to members living at the time, and the other in the right of deceased members. In the provisions dealing with the first class there were express restrictions on the right of alienation, and in those dealing with the second class there was an entire absence of such restrictions. Because of this difference in terms we held that Congress intended that allotments of the second class should be unrestricted. The differences between those earlier acts and that of 1906 are pronounced and reasonably can be explained on no other theory *than that Congress intended that all allotments under the act of 1906 should be restricted, subject of course to the issue of certificates of competency.* And that this is what was intended becomes even more manifest when it is considered that in the meantime Congress had imposed other restrictions in respect of allotments under the earlier acts and in doing so had discarded the distinction before made between the two classes of allotments so far as full-blood Indian heirs were concerned. *Talley* v. *Burgess, supra.* (Italics ours.)

(c) *Lands purchased.*

Respecting interests in Osage lands held by noncompetents as purchasers from those who were competent to convey (class 1 [c], p. 8), we think the same considerations which lead to a conclusion

that noncompetent heirs of competent decedents, the class just considered, were subject to the supervision of the Secretary of the Interior would make a like conclusion necessary as to the inability of noncompetents as purchasers. As the land involved was Osage land, Congress might impose restrictions; the clear purpose as to all Osage lands was that they should be inalienable except in the hands of nonmembers or those who might receive certificates of competency. The fact that the noncompetent purchases from one competent to convey does not remove from the former the restriction which Congress imposed upon him in dealing with Osage lands. As we have already said, the personal status of the individual Osage and not the status of the land is the test of the power of conveying or leasing without supervision.

2. Leases of lands of minors.

This brings us to a consideration of leases made of lands of minors. The Act (section 7) contains this language:

> *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; * * *

(a) *1. Leases by noncompetent parents.*

We first take up leases executed by noncompetent parents. Class 2 [a–1], p. 8. The same reasons for not allowing noncompetent adults to lease

would apply to the case of noncompetent parents. If the noncompetent adult must have approval of the Secretary to lease his own land, certainly he needs supervision when leasing lands of his child. The control mentioned in the section does not mean control untrammeled or without supervision.

(2) Leases by competent parents.

and

(b) *Leases of white parents, nonmembers.*

We pass to the case of competent parents, and white parents nonmembers of the tribe. Class 2 [a–2] and b, p. 8. We consider them together because their status is similar. The nonmember is unrestricted. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432.

While these two are not subject to supervision by the Secretary with respect to their own lands, yet when dealing with the property of their children they occupy a different status. It is one thing for competent members to act for themselves, but quite another to act in a representative capacity for their noncompetent children.

The fair construction of section 7 is that it is designed to place under the supervision of the Secretary of the Interior the leasing of all lands except the lands of nonmembers or of members holding certificates of competency. In giving to parents the control of the lands of their minor children it was certainly not the intent of the statute to confer

on such parents a less restricted power to lease than the owners themselves would be under upon attaining their majority. Nor is it reasonable to suppose that it was the intent of Congress to divest such children of the protection usually incident to wardship.

It is important to note the precise language contained in the *proviso* to section 7 now under consideration, and to compare it with the other parts of the same section. The proviso reads:

> Provided, That parents of minor members of the tribe shall have *the control and use* of said *minors' lands, together with the proceeds of the same,* until said minors arrive at their majority. (Italics ours.)

The preceding part of the section reads:

> That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right *to use* and *to lease* said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have *full control* of the same, *including the proceeds thereof.* (Italics ours.)

It will be observed that the rights given the parents are the same as those given the individual members, *with this important exception—the right to lease is not given.* The words " to lease " in the

first part of the section are omitted in the proviso. We think this omission intentional and as indicating that the parents were to have only the personal control and use of the lands of their minor children for the purpose of farming, grazing, etc.

Furthermore, the regulations under this Act, promulgated by the Secretary of the Interior, specifically required that leases of minor children's lands must be approved. Section 4 of the Regulations provides (R. 13):

> Leases covering homesteads of allottees to whom certificates of competency have been issued or lands allotted to or inherited by such allottee's minor children are invalid without the approval of the Secretary of the Interior as provided in these regulations.

Light is thrown upon the purpose of Congress in respect to parental authority by the provisions of section 3 of the Act of April 18, 1912, *supra*, where, although placing the property of deceased and orphan minors, insane or other incompetents, in probate under the jurisdiction of the Oklahoma county courts, it was provided that no guardian should be appointed for a minor whose parents are living, and then came a provision that no land should be sold or alienated under the provisions of that section without the approval of the Secretary of the Interior. That proviso related clearly to property under the jurisdiction of the county courts and also to that held by parents for their minor children.

This question is further illuminated by what was said in the House of Representatives when the 1912 Act was being considered. Cong. Rec., 62d Cong. (2d sess.), vol. 48, pt. 5, pp. 4243 et seq.

In opening the consideration of the bill, Mr. Stephens, chairman of the committee reporting it, yielded to Mr. McGuire, the author of the bill and the one who wrote the report, and in effect made him chairman of the committee for the presentation of the bill. Page 4243. In the course of the discussion, which related more particularly to the question of payment of taxes upon the surplus property of the Osages, the following occurred (page 4244):

> Mr. McGUIRE of Oklahoma. The agreement with these people by the Interior Department at the time of the allotment of this land, under the Act of 1906, was that the surplus land should be taxed. There is no other way to provide for local government. I will explain that there were 656 acres of land for each one, and every acre was a sufficient guarantee for the Indians. They have about 655 acres each.
>
> Mr. MANN. How long will they have it? You can take it away from them through the taxing power.
>
> Mr. McGUIRE of Oklahoma. Just as long as the Secretary of the Interior protects them, *because there is no instance in this bill or in any bill where anything may be done with the lands and funds of those incompetent Indians without the authority from the*

Secretary of the Interior. We provide in this bill that the Secretary of the Interior may, out of the fund of the Indians now in the Treasury of the United States, pay the tax upon this land. (Italics ours.)

Mr. MANN. Where is that provision?

Mr. MCGUIRE of Oklahoma. Right here in the bill. We will reach it shortly.

Mr. MANN. I say, where is it in the bill? I would like to know.

Mr. MCGUIRE of Oklahoma. There is no interest of the Indians that is not guarded in the bill. I can find it in a second.

Mr. CONNELL. Mr. Chairman, will the gentleman yield?

The CHAIRMAN. Does the gentleman from Oklahoma yield to the gentleman from New York?

Mr. MCGUIRE of Oklahoma. Yes.

Mr. CONNELL. I would like to know in just a word while the gentleman is on that point, to clear it up, under this extended taxation that is proposed in the bill for these lands——

Mr. MCGUIRE of Oklahoma. Not extended——

Mr. CONNELL. What will become of the minors and the children of the Indians who might inherit some of it? Are they provided for, or will they become paupers, dependent on the State?

Mr. MCGUIRE, of Oklahoma. The bill absolutely protects in every detail the minors and persons who may inherit land who have Osage Indian blood in their veins *by provid-*

ing that no steps shall be taken without the approval of the Secretary of the Interior, and that is the provision now under the law of 1906. (Italics ours.)

It must be borne in mind that the legislation now under consideration forbids alienation except as expressly provided otherwise. Since a lease of property is an alienation thereof (*Parker* v. *Riley*, 243 Fed. 42, and cases cited), it is incumbent on appellants to show that the leases in question find specific sanction in the statute.

(*c*) *Leases by guardians duly appointed.*

Leases made on behalf of minors or other noncompetents with the approval only of the county court having jurisdiction of the estate or control of guardians are likewise invalid. Class 2 [c], p. 8. That is evident particularly in the light of the proviso in section 3 of the 1912 Act, since in addition to the approval of the county court that of the Secretary of the Interior is necessary. Under the 1906 Act no lease of lands of noncompetent members is effective unless it has the approval of the Secretary. There is no provision in the 1906 Act giving any jurisdiction to county or other State courts in any matter affecting the property of the Osages. That was later given in the 1912 Act, but with the limitations already referred to.

Moreover, section 9 of the Secretary's regulations required approval of leases by guardians, executors, or administrators (R. 14), thus:

> Lands of deceased allottees may be leased by the heirs jointly; the natural or legal guardian shall act for minor heirs, and said superintendent may execute leases in behalf of any absent heirs, or whose whereabouts is unknown. During the period of administration lands may be leased by administrators or executors for a period not to exceed one year, or in case no administrator or executor has been appointed, the superintendent of the Osage agency may execute leases in behalf of the undetermined heirs, but all such leases shall require the approval of the Secretary of the Interior to be valid.

3. Leases of homestead lands of competent adults.

Appellants concede that leases by *competent* adult members of their allotted homesteads are invalid unless approved by the Secretary (Appellants' brief, p. 43). It would be impossible to seriously contend otherwise in view of the plain terms of section 2 of the Act of June 28, 1906, *supra*, for under that section (seventh paragraph, 34 Stat. 542) competent members can not alienate their homesteads.

4. Lands held in common.

This branch of the case relates to tracts of the whole of which the defendants were in possession and which were claimed by them (1) as owners of an undivided unrestricted interest and by lease of the balance; the former concededly valid, the latter

asserted to be invalid because the interest was restricted and the lease not approved by the Secretary, and (2) by lease entirely; but only a portion of the leased interest was conceded valid and the rest asserted to be invalid because the interest was restricted and the lease not approved by the Secretary of the Interior.

The situation thus presented is unusual, but we believe under the peculiar conditions existing as to the lands of the Osage Indians, that the usual rights of an owner in common must be subordinated to the apparent purpose and intent of Congress.

The views expressed by the Court of Appeals on this point we consider cogent and forceful and fully covering the matter. We quote from the opinion (R. 66; 256 Fed. 12):

> As to instances where the land is held by tenants in common, part of whom are noncompetent and part competent or nonmembers of the tribe, a more perplexing situation is presented. Each of such tenants is, under the ordinary rules of tenancy in common, entitled to ingress, egress, and possession of the land and to a proper share of the benefits from the usage of the land. Such rights may be transferred by those legally capable of acting for themselves in such matters. But these considerations must bow to the requirements of the statute. Tenancy in common does not change a noncompetent into a competent Indian, nor in any wise increase the power of such to deal

with his interest in land so held. On the other hand, to permit the competent tenant to lease or use the entire tract or any undivided portion thereof, even though he accounted to the noncompetent tenant for his just portion, would completely obliterate that protection of supervision and approval which the statute carefully lodges in the Secretary alone. Therefore the conclusion seems necessary that no lease of any part or interest in Osage Indian land held in common where one or more of such tenants in common are noncompetents can be made without the approval of the Secretary. Only through such a conclusion can the protection required by the statute be preserved. Apparent injustice to the competent or nonmember tenant can not prevail against the statute, and such result is easily avoidable through the definite separation of land among the tenants through partition in accordance with the provisions of section 6 of the act of 1912, 37 Stat. 86.

Appellants contend that the decree below was erroneous as there was no ground for equitable interference, and that it went too far in that it prohibited them from entering into leases with the Osages.

The argument in support of this latter proposition runs something like this: It was the purpose of Congress to start the Osages on the road to complete emancipation; as to leases, the Act of 1906 provided that they should be subject " only to ap-

proval " by the Secretary of the Interior; this clearly indicated that the Osages were free to make such bargains as they saw fit, hence the Secretary had no power to make regulations governing leases, but merely to approve; therefore until lessees went into possession under a lease unapproved, the Secretary of the Interior had no occasion to object, and the ignoring or violation of the regulations in respect to making leases did not call for equitable relief. Appellants' brief, pp. 34–44.

We fail to see any such significance in the language of section 7 as that which appellants spell out of it. The language relating to approval is that the leases are to be " subject only to the approval of the Secretary of the Interior." Now the word " only " might very properly be said to indicate that no one other than the Secretary need approve to make the leases valid. It might have been intended to indicate that consent of the tribal council was not also necessary, or that approval by a county court was not required where the lessor was an orphan minor and had a guardian appointed by such court.

Appellants' interpretation seems forced, particularly in view of section 12 of the Act which authorized the Secretary to do all things necessary to carry out the purposes of the Act.

Now, the regulations (R. 7–15) required certain formalities with respect to the execution and approval of the leases. These regulations were not unreasonable, inappropriate, or inconsistent with

the Act, hence they should be held to be valid. *United States* v. *Morehead*, 243 U. S. 607.

Moreover, the regulations appear to have been considered, and seem to have been at least tacitly approved, by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 436, 437.

But in any event, as the Court of Appeals said (256 Fed., at page 14):

> There is a clear ground of equitable interference by the Government stated in the bill, in that leases made contrary to the statute cast clouds upon the title which the Government holds in trust for the Indians.

Further, appellants have ignored the requests of the Secretary of the Interior, have defied his authority in the matter of leasing the lands of Osages, and have shown an utter disregard of all restraints designed to protect the Indians.

CONCLUSION.

It follows that the decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

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NOVEMBER, 1920.

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